Nos. 337, 338 & 339.

Brf. of Wilson for Appellees

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Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 337, 338, and 339.

THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW AND THE CHICKASAW NATIONS
APPELLEES.

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Attorney of Choctaws and Chickasaws.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 2-28-1900

IN THE

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THE UNITED STATES, APPELLANT,

vs.

THE CHOCTAW AND THE CHICKASAW NATIONS, APPELLEES.

STATEMENT OF THE CASE.

This case arose out of a controversy in relation to the ownership, legal or equitable, of a tract of land containing 743,257.19 acres of land, or thereabouts, embraced within what is known in this case as "The Leased District," which forms a part of what has heretofore been known as the Indian Territory.

The Choctaw and Chickasaw nations of Indians, claimants in this case, contend that they are in equity the owners in fee-simple of this land; that the United States hold the lands in trust for specific purposes, which will hereinafter be more fully stated, and that as soon as these specific purposes are departed from by the United States the claimant Indians are entitled to the said lands or the value thereof.

The Wichitas and affiliated bands of Indians, defendants, claim to be entitled to said lands (*a*) by virtue of their aboriginal title of occupancy; (*b*) by virtue of a treaty made between them and other Indian tribes and bands in 1835, the particulars of which will be hereinafter fully stated, and (*c*) because of the location of them on lands in the leased district in 1859, pursuant to the treaty of 1855 hereinafter mentioned.

The United States contend that they own said lands by virtue of a certain treaty made between the Choctaw and Chickasaw nations and the United States on the 28th of April, 1866, the provisions of which will be hereinafter fully set out and discussed.

THE FACTS.

1. Prior to 1820 the Choctaws and Chickasaws occupied vast tracts of country east of the Mississippi river, in the States of Mississippi and Alabama. They owned and held these lands by right of their aboriginal possession. They were neighbors, were friendly with and related to each other, and spoke practically the same language. As these States became more and more thickly settled by the whites, many conflicts naturally arose between them and the Indians; the States enacted various laws hostile to the Indians, and the United States, because of this condition of affairs, desired to procure the removal of said Indians from their lands east of the Mississippi to lands west of that river, in a country not occupied by the whites, and where the Indians could have lands and a government of their own, free from intrusion.

2. These conditions resulted in the treaty of the 18th of October, 1820 (7 Stats., 210; Appendix to Record, pages 9, 10, and 11), and the other treaties hereinafter mentioned. By the first article of said treaty of 1820 the Choctaws, who

were then residing east of the Mississippi river, as above stated, ceded to the United States a part of the land held and occupied by them east of said river, namely, about six million acres, in consideration for which the United States, in the second article of said treaty, ceded to the Choctaws a tract of country in what is now known as the Indian Territory, described as follows:

"Beginning on the Arkansas river where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down the Red river to the mouth of Little river which empties itself into Red river on the north side; thence in a direct line to the beginning."

While it is unimportant to be here noted, it may be mentioned that the eastern boundary of this tract was changed by the treaty with the Chocktaws of 1825 (7 Stats., 234, 235).

The lands occupied and held by the Choctaws east of the Mississippi were not burdened with or subject to any Indian occupancy other than their own, and there is no mention made in the treaty of 1820 of the occupation of the lands west of the Mississippi therein ceded, by any Indian nation or tribe whatsoever, and so far as any information is derivable from the treaty, and at least presumably, the Choctaws understood that they were receiving this land, and they did in fact and in law receive it, in fee-simple and as the sole occupants thereof, and for which they paid a valuable consideration.

3. This hostility of the white inhabitants of the Southern States east of the Mississippi river to the Indians within their borders and the desire of the United States to effect their removal to the country west of the Mississippi, and thereby put an end to the controversies that had arisen, resulted, in 1830, in an act of Congress (4 Stats., 411) providing as follows:

"*Be it enacted, &c.*, That it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States west of the River Mississippi, not included in any State or organized Territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and remove there, and to cause each of said districts to be so described, by natural or artificial marks, as to be easily distinguished from every other.

"2. *And be it further enacted*, That it shall and may be lawful for the President to exchange any or all of such districts, so to be laid off and described, with any tribe or nation of Indians now residing within the limits of any of the States or Territories, and with which the United States have existing treaties, for the whole or any part or portion of the territory claimed and occupied by such tribe or nation, within the bounds of any one or more of the States or Territories, where the land claimed and occupied by the Indians is owned by the United States, or the United States are bound to the State within which it lies to extinguish the Indian claim thereto.

"3. *And be it further enacted*, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

4. The treaty of 1820 having resulted only in a partial removal of the Choctaws to the country west of the Mississippi, it was found necessary to resort to further assurances and inducements to obtain their complete removal to said country, and therefore, on the 27th of September, 1830 (7 Stats., 333), another treaty was entered into between the

United States and the Choctaws, from which we quote articles 2, 3, 4, 12, and 18, as follows:

"ARTICLE 2. The United States, under a grant specially to be made by the President of the U. S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington city in the year 1825. The grant to be executed as soon as the present treaty shall be ratified.

"ARTICLE 3. In consideration of the provisions contained in the several articles of this treaty, the Choctaw nation of Indians consent, and hereby cede to the United States the entire country they own and possess east of the Mississippi river; and they agree to remove beyond the Mississippi river, early as practicable, and will so arrange their removal that as many as possible of their people, not exceeding one-half of the whole number, shall depart during the falls of 1831 and 1832, the residue to follow during the succeeding fall of 1833; a better opportunity in this manner will be afforded the Government to extend to them the facilities and comforts which it is desirable should be extended in conveying them to their new homes.

"ARTICLE 4. The Government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have the right to pass laws for the government of the Choctaw nation of red people and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the Constitution, treaties, and laws of the United States,

and except such as may, and which have been, enacted by Congress, to the extent that Congress, under the Constitution, are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation and infringe any of their national regulations.

"ARTICLE 12. All intruders shall be removed from the Choctaw nation, and kept without it. Private property to be always respected and on no occasion taken for public purposes without just compensation being made therefor to the rightful owner," &c.

"ARTICLE 18. The U. S. shall cause the lands hereby ceded to be surveyed; and surveyors may enter the Choctaw country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But no person is to be permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove. And for the payment of the several amounts secured in this treaty, the lands hereby ceded are to remain a fund pledged to that purpose until the debt shall be provided for and arranged. And further it is agreed that in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This treaty was executed irrespective of the act of Congress above quoted. In it there will be found various provisions, not above quoted, with reference to the removal of the Choctaws from their country east of the Mississippi to the territory ceded to them by the treaty of 1820, and from these provisions it will appear that not only was this cession of the land west of the Mississippi to the Choctaws contemplated, but their removal from the country east of the Mississippi, where their presence was so obnoxious, was secured (119 U. S., 37).

The particular features of said treaty to which we beg to invite the attention of the court are:

(a.) A stipulation that the United States, under a special agreement made by the President, "shall cause to be con-

eyed to the Choctaw nation a tract of country west of the lississippi river, in fee-simple, to them and their descend-nts, to inure to them while they shall exist as a nation and ve on it."

(*b.*) In consideration of the provisions contained in the everal articles of said treaty, the Choctaws ceded to the nited States "the entire country they own and possess ast of the Mississippi river, and they agree to remove be-ond the Mississippi river as early as practicable, and will arrange their removal that as many as possible of their eople, not exceeding one-half their whole number, shall epart during the falls of 1831 and 1832, the residue to llow during the succeeding fall of 1833."

(*c.*) The United States agree to secure "to the Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits," and it is stipulated on the part of the United tates "that no State shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendants, and that no part of the land granted to them shall ever be embraced in a Territory or State."

5. Pursuant to this treaty of 1830 the removal of the hoctaws began, and, without detailing any of the history onnected with that removal, it is sufficient for the purpose f this statement to call attention to the fact that by the treaty f 1830 the United States were under the obligation to con-ey to the Choctaws and their descendants in fee-simple he lands so assigned to them west of the Mississippi. Ac-ordingly on the 22d of March, 1842, a patent was issued y the President of the United States containing the fol-owing provisions:

"The United States of America, in consideration of the remises, and in execution of the agreement and stipulation

in the aforesaid treaty, have given and granted, and by these presents do give and grant, unto the said Choctaw nation the aforesaid tract of country west of the Mississippi, to have and to hold the same, with all the rights, privileges, immunities and appurtenances, as intended to be conveyed to them in the aforesaid article, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it, liable to no transfer and alienation except to the United States and with their consent."

App. Record, p. 29.

This patent was duly recorded.

6. Pursuant to the purpose of the Government of the United States to remove from the States east of the Mississippi the various Indian nations and tribes that were causing dissensions and conflicts, practically the same arrangements were made with the Chickasaws, Cherokees, Seminoles, and Creeks, by which these Indians relinquished their territory east of the Mississippi and removed to the Indian country west of that river. (See treaty with Cherokees, July 8, 1817, 7 Stats., 156; treaty with Creeks, February 12, 1825, 7 Stats., 237, and treaty with Seminoles, March 28, 1833, 7 Stats., 423.) In the case of the Chickasaws, however, a distinction was made, to which we shall presently refer.

The Chickasaws, although neighbors of and speaking practically the same language as the Choctaws, as above stated, were a distinct and independent nation of Indians, occupying a large tract of country in the States of Tennessee and Mississippi. In furtherance of the purposes and policy above stated, on the 20th of October, 1832, the United States entered into a treaty with these Indians, which was proclaimed on the 1st of March, 1832 (7 Stats., 381), by the first article of which they ceded to the United States all their said property lying east of the Mississippi. By article 2 of this treaty the United States agreed to have the prop-

erty so ceded surveyed and sold, and in article 3 it is provided that, as a consideration for said cession, payment shall be made to the Chickasaws from time to time of the proceeds of such sales, deducting expenses of survey, sale, etc.; the United States to aid them in a home west of the Mississippi.

Under these conditions negotiations were carried on between the Choctaws and Chickasaws, at the instance and under the supervision of the United States, the result of which was that, on the 17th of February, 1837, a convention was entered into between the Choctaw and Chickasaw nations (11 Stats., 573), which was approved by the Senate and President of the United States, the first and third articles of which are as follows:

"ARTICLE 1. It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw nation, to have an equal representation in their general council, and to be placed on an equal footing in every other respect with any of the other districts of said nation, except a voice in the management of the consideration which is given for these rights and privileges; and the Chickasaw people to be entitled to all the rights and privileges of Choctaws, with the exception of participating in the Choctaw annuities, and the consideration to be paid for these rights and privileges, and to be subject to the same laws to which the Chactaws are; but the Chickasaws reserve to themselves the sole right and privilege of controlling and managing the residue of their funds, as far as is consistent with the late treaty between the said people and the Government of the United States, and of making such regulations and electing such officers for that purpose as they may think proper.

"ARTICLE 3. The Chickasaws agree to pay the Choctaws, as a consideration for these rights and privileges, the sum of five hundred and thirty thousand dollars, thirty thousand of which shall be paid at the time and in the manner

that the Choctaw annuity of 1837 is paid, and the remaining five hundred thousand dollars to be invested in some safe and secure stocks, under the direction of the Government of the United States, redeemable within a period of less than 20 years, and the Government of the United States shall cause the interest arising therefrom to be paid annually to the Choctaws in the following manner: Twenty thousand dollars of which to be paid as the present Choctaw annuity is paid, for four years, and the residue to be subject to the control of the general council of the Choctaws, and, after the expiration of four years, the whole of said interest to be subject to the entire control of the said council."

It will be seen from the above that the Chickasaws were to form a district or separate country in the territory of the Choctaws; that said territory was to be held in common, and was to be occupied on the same terms with the Choctaws, except as to the right of disposition, and that the dominion of these two nations over this tract was complete and absolute.

7. As above stated, the policy of the Government up to this time had been to remove these Indians from the States east of the Mississippi, to which they had held aboriginal title and ownership, but where their presence was offensive to the whites, into the country west of the Mississippi river, and to preserve to them and their descendants forever their respective tribal relations and governments, a policy which was continued, as will hereinafter appear, until quite a recent date (1889).

The lands thus ceded to the Choctaws, Chickasaws, Cherokees, Seminoles, and Creeks constitutes what for many years was known as the Indian Territory, over which, by all the solemn guarantees that it was possible for the United States to make, these several Indian nations were to have exclusive jurisdiction and government, except so far as their laws might come into conflict with the Constitution and laws of the United States.

Between the years 1837 and 1855 the United States, in further pursuance of said policy, conceived the purpose of locating Indians other than these five civilized tribes upon such part of their territory as was not needed or used by them, and on the 22d of June, 1855, the Choctaws having moved into said territory and being in occupancy thereof in common with the Chickasaws, as aforesaid, the Government of the United States entered into a treaty with the Choctaws and Chickasaws (11 Stats., 611 *et seq.*), articles 9 and 10 of which are as follow:

"ARTICLE 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in and to any and all lands west of the one-hundredth degree of west longitude; and the Choctaws and Chickasaws do hereby *lease* to the United States all that portion of their common territory west of the ninety-eighth degree of west longitude for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein, excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas river, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas, which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government: *Provided, however*, The territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

"ARTICLE 10. In consideration of the foregoing relinquishment and lease, and as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct."

The features of this treaty to which attention is specially invited are the following:

That the Wichitas and other tribes or bands of Indians therein referred to were not, before the execution of this treaty, occupants of the tract of land in controversy or any part of the "Leased District;" that the United States desired to procure the privilege of settling these Indians there, and that for the purpose of securing this right it was considered necessary to enter into this treaty of 1855 with the Choctaws and Chickasaws, the recognized owners of said land, as aforesaid.

By article 1 of this treaty of 1855 the boundaries of the Choctaw and Chickasaw country are specifically defined. The United States grants forever the lands within these limits (of which the lands in controversy are a part) to the members of the Choctaw and Chickasaw nations, their heirs and successors, *to be held in common*, so that each and every member of either tribe shall have an equal undivided interest in the whole. All persons not being members of either tribe (with certain named exceptions) are to be considered intruders and to be removed from said land by the United States agent, &c., and no persons are permitted to reside within the limits of this tract except with the permission of the Choctaws and Chickasaws.

It is further to be observed that the lease that was made of a part of this Choctaw country by the express terms of article 9 of said treaty of 1855 was for the permanent settlement of the Wichitas and such other tribes or bands of Indians as the United States might desire to locate thereon, and for no other purpose or use; that, notwithstanding this lease, there was reserved to the Choctaws and Chickasaws the right to settle thereon as theretofore; that when the Government should locate such Indians thereon, while the Indians so located were to be subject to the exclusive control of the United States, under such rules and regulations as the President might prescribe, nevertheless these rules were not

to be inconsistent with the rights and interests of the Choctaws and Chickasaws, thus again recognizing the right of said nations to the exclusive ownership and government of this tract of country.

Pursuant to said treaty of 1855, the Wichitas and affiliated bands, as they are called, were located in the tract of country known in this case as the "Leased District," to compensation for their equity in which the Choctaws and Chickasaws are making claim.

In 1864 the Commissioner of Indian Affairs, in his annual report of that year, made the suggestion that the Choctaws and Chickasaws, and other nations of Indians located in what is now known as the Indian Territory, should be required to receive within the limits of their country other *tribes* with whom they were on friendly terms, and urged "the importance of preserving the Indian country *for the use of the Indians alone* * * * and, if need be, enforcing such terms (in treaties) as will secure ample homes within that country for all such tribes as from time to time it may be found practicable and expedient to remove thereto."

As in the cases of the States of Mississippi, Alabama, and Tennessee, before mentioned, so in the Western States of Kansas, Colorado, Texas, &c., there were Indians residing which these States desired to have removed. In pursuance of the above suggestion of the Commissioner of Indian Affairs, steps were taken with this end in view. Accordingly, in the month of September, 1865, at the instance of the Government of the United States, delegates or representatives of various Indian tribes, including the Choctaws, Chickasaws, Creeks, Cherokees, Seminoles, Osages, Senecas, Shawnees, Quapaws, Wyandottes, Wichitas, and Comanches, convened in council at Fort Smith, Arkansas, and were there met by a commission, appointed by the President, consisting of the Hon. D. N. Cooley, Commissioner of Indian Affairs; the Hon. Elijah Sells, superintendent of the Southern Superintendency; Thomas Wistar, a leading member of

the Society of Friends; Brigadier General W. S. Harney, of the United States Army, and Col. Eli S. Parker, also of the United States Army, and a member of General Grant's staff.

At this council or convention the purposes or wishes of the Government with regard to this scheme of colonization and other matters were made known to the Indians. They are embodied in the seven propositions which are set forth in full on the fifteenth page of the petition of claimants in this case. It is not necessary at this point to repeat any but the fifth, which is in these words:

"5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein."

In submitting these propositions to the assembled delegates, the Hon. D. N. Cooley, Commissioner of Indian Affairs, in elucidation of the provisions contained therein, with regard to the said fifth proposition addressed them as follows:

"A portion of the lands hitherto owned and occupied by you *must be set apart for the friendly tribes now in Kansas and elsewhere*, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."

The proceedings of the council show that "the president of the U. S. commission then stated that the agents will be supplied with printed copies of the address, and are requested to go with an interpreter to their respective tribes for the purpose of fully explaining what is said therein." (See Report of Comm'r Ind. Aff. 1865, second day, Sept. 9, 1865). It will be observed that this speech of the Commissioner was addressed, not to the representatives of any particular tribe or tribes of Indians, but to the delegates of them all in the aggregate.

The propositions above referred to, including the fifth

thereof, as stated in the language just above quoted, having been submitted to the delegates, as aforesaid, they were by said delegates accepted, so far as they had authority, and taken to their respective tribes or nations, and thereafter the said tribes appointed other delegates to treat with the United States upon the basis of the said several propositions. Subsequently treaties were made upon this basis by said several tribes. (The treaties, other than that with the Choctaws and Chickasaws, will be hereinafter considered in connection with the main question in this case, and it is therefore not necessary to refer to them now.)

Said propositions were handed to the Choctaw and Chickasaw representatives in that convention to consider, and the indorsement on the back of those propositions was evidently also considered by said Choctaw and Chickasaw representatives, because said representatives made formal reply to the original propositions and to the indorsement. (See Record, pp. 76 and 142; App. Record, p. 148.)

There must also have been some interchange of views between the United States commissioners and the Choctaw and Chickasaw representatives at that particular time as to the form and substance of a new treaty, besides the preliminary or peace treaty, to be entered into, because then and there the United States commissioners drew the form of a new treaty and gave it to the Choctaw and Chickasaw representatives, to be taken home with them, to be considered as an expression of what the United States would require of the Choctaws and Chickasaws, the fifth article of which is mainly important in this connection and is as follows:

"ART. 5. The Choctaw and Chickasaw tribes agree to a modification of the ninth article of the treaty concluded in the city of Washington the 22d day of June, A. D. 1855, by which they agree that all of that portion of their common territory west of the 98th degree of west longitude leased to the United States may be used for the permanent settlement of the Wichita and such other tribes or bands of Indians as

the Government may desire to locate thereon without e
ception or restriction as to the character of the tribes."

It is important to state that there is nothing in the reco
or history pertaining to this case showing anything else
to the policy and purpose of the United States leading
the treaty of April 28, 1866, than the said fifth propositi
and the said fifth article of said unsigned treaty.

It is manifest that the purpose was by the treaty of 18
to enlarge the treaty of 1855 so as to admit the settleme
of Indians not embraced in the treaty of 1855.

Among the treaties so made as a result of the event ju
mentioned was one with the Choctaws and Chickasaw
dated the 28th of April, 1866 (14 Stats., 769), by the fir
article of which peace was declared. By the second, slaver
was abolished, except in punishment of crime, &c. Ti
3d, 4th, 5th, 7th, 8th, 10th, 43d, 45th, and 46th articles a
as follows:

"The Choctaws and Chickasaws, in consideration of th
sum of three hundred thousand dollars, hereby cede to th
United States the territory west of the 98th degree we
longitude, known as the leased district, provided that th
said sum shall be invested and held by the United State
at an interest not less than five per cent., in trust for th
said nations until the legislatures of the Choctaw an
Chickasaw nations, respectively, shall have made such law
rules, and regulations as may be necessary to give all pe
sons of African descent resident in the said nations at th
date of the treaty of Fort Smith and their descendant
heretofore held in slavery among said nations, all th
rights, privileges and immunities, including the right o
suffrage, of citizens of said nations, except in the annuitie
moneys, and public domain claimed by or belonging t
said nations, respectively, and also to give to such person
who are residents and their descendants, forty acres each o
the land of said nations on the same terms as the Choctaw
and Chickasaws, to be selected on the survey of said lan
after the Choctaws and Chickasaws and Kansas Indian
have made their selections as herein provided, and imme

diately on the enactment of such laws, rules and regulations the said sum of three hundred thousand dollars shall be paid to the said Choctaw and Chickasaw nations in the proportion of three-fourths to the former and one-fourth to the latter, less such sum, at the rate of one hundred dollars *per capita*, as shall be sufficient to pay such persons of African descent before referred to as, within ninety days before the passage of such laws, rules, and regulations, shall elect to move, and actually remove, from the said nations respectively. And should the said laws, rules, and regulations not be made by the legislatures of said nations, respectively, within two years from the ratification of this treaty, then the said sum of three hundred thousand dollars shall cease to be held in trust for the said Choctaw and Chickasaw nations, and be held for the use and benefit of such persons of African descent as the United States shall remove from the said territory in such manner as the United States shall deem proper, the United States agreeing, within ninety days from the expiration of said two years, to remove from said nations all such persons of African descent as may be willing to remove, those remaining or returning after having been removed from said nations to have no benefit of said sum of three hundred thousand dollars or any part thereof, but shall be upon the same footing as other citizens of the United States in said nations."

"ARTICLE 5. A general amnesty of all past offenses against the laws of the United States, committed before the signing of this treaty by any member of the Choctaw or Chickasaw nations, is hereby declared; and the United States will especially request the States of Missouri, Kansas, Arkansas, and Texas to grant the like amnesty as to all offenses committed by any member of the Choctaw or Chickasaw nation. And the Choctaws and Chickasaws, anxious for the restoration of kind and friendly feelings towards themselves, do hereby declare an amnesty for all past offenses against their respective governments, and no Indian or Indians shall be proscribed, or any act of forfeiture or confiscation passed against those who may have remained friendly to the United States, but they shall enjoy equal privileges with other members of said tribes, and all laws heretofore passed inconsistent herewith are hereby repealed."

"ARTICLE 7. The Choctaws and Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: *Provided, however*, such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw nations respectively."

"ARTICLE 10. The United States reaffirm all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw nations, entered into prior to the late rebellion and in force at that time, not inconsistent herewith; and further agree to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation from and after the close of the fical year ending on the 30th of June, in the year 1866."

"ARTICLE 43. The United States promise and agree that no white person, except officers, agents, and employés of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or to be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations."

"ARTICLE 45. All rights, privileges, and immunities heretofore possessed by said nations, or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

"ARTICLE 46. Of the moneys stipulated to be paid to the

Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys, or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to remain in the Treasury of the United States at an annual interest of not less than five per cent., no part of which shall be paid out as annuity, but shall be annually paid to the treasurers of said nations, respectively, to be judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively."

In substance, the above treaty is a declaration of amnesty and a condonation of all past offenses committed by either of the parties against the other before the signing of the treaty; a consent that the United States should pass laws for the better administration of justice and the protection of the rights of person and property within the Indian Territory; a reaffirming by the United States of all its obligations to the Choctaws and Chickasaws arising out of treaty stipulations entered into prior to the rebellion; an agreement to renew payment of annuities accruing under such treaty stipulations; an agreement that no white persons (with certain exceptions) should be permitted to go into the Indian country unless incorporated or naturalized under their laws, and a restoration of all rights, privileges, and immunities possessed by the Choctaws and Chickasaws under treaties theretofore made.

Finally, in article 3, in consideration of the sum of $300,000, there is a cession by the Choctaws and Chickasaws, apparently absolute on its face, of "the territory west of the

98th degree west longitude, known as the "leased district," said $300,000 to be held in trust by the United States, however, "until the legislatures of the Choctaw and Chickasaw "nations, respectively, shall have made such laws, rules "and regulations as may be necessary to give to persons of "African descent resident in said nations at the date of the "treaty of Fort Smith, and their descendants, heretofore "held in slavery among said nations, all the rights, privi- "leges and immunities, including the right of suffrage, of "citizens of said nations," &c., and 40 acres of land each, to be selected after survey.

9. Upon the conclusion of this treaty of 1866 the United States proceeded to colonize on the lands so acquired from the Choctaws and Chickasaws other bands and tribes of Indians, among which were the Cheyennes, Arapahoes, Kiowas, Comanches, and Apaches. The Wichitas had been located on a part of the "leased district," under the treaty of 1855, by the Indian agents Neighbors and Rector.

The Wichitas and Keechies were located on a tract of 69,120 acres, and the Caddoes, Delawares, and Texas Indians were located on a tract of 85,120 acres, making a total of 154,240 acres. (See Sen. Ex. Doc. No. 13, 48th Cong., 1st sess., pp. 7, 8, and 25, and accompanying map.)

Brief.

I.

The question in issue between the Choctaw and Chickasaw nations and the United States.

Recapitulating briefly what is presented in the foregoing statement of facts, it will be remembered that prior to 1820 the Choctaws were the owners of large tracts of land east of the Mississippi river; that they were induced by the considerations above named to part with these lands and remove to the country in which they now reside west of the Mississippi river; that the lands to which they so removed were conveyed to them in fee-simple, and that they were guaranteed the right of self-government and freedom from intrusion by the whites; that, pursuant to the treaty of 1837, the Chickasaws, who also owned lands east of the Mississippi, were located upon the lands of the Choctaws in the Indian Territory; that by the treaty of 1855 the Choctaws quitclaimed and relinquished to the United States all their right, title, and interest in and to their lands west of the 100th degree of west longitude, and the Choctaws and Chickasaws together leased to the United States that portion of their common territory lying between the 98th and 100th degrees, known as the "leased district."

It will be further remembered that this country was leased to the United States for "the permanent settlement of the "Wichita and such other tribes or bands of Indians as the "Government may desire to locate therein, *excluding, how-*"*ever, all the Indians of New Mexico and also those whose* "*usual ranges at present are north of the Arkansas river*," etc.; that subsequently, having adopted the policy with regard to the Indians having their habitat in the States of Kansas, Colorado, and Texas that had been formerly adopted with

regard to the Indians in the States east of the Mississippi, the United States, as clearly appears from the unsigned treaty of 1865 and the address of the Commissioner of Indian Affairs to the Indians assembled at Fort Smith, obtained from the Choctaws and Chickasaws a cession of the "leased district" for the purpose of removing the restriction that existed in the lease of 1855 with regard to the Indians that might be settled thereon.

And it is a matter of history, of which the court will take judicial notice, that in 1889 the Government of the United States, yielding to the requirements and demands of the white settlers for land, abandoned its policy of preserving for the use of the Indians alone the lands embraced within the Indian Territory, and decided to open said country for settlement under the pre-emption and homestead laws of the United States. When, in the act of March 2, 1889 (25 Stat., 1005), this plan was carried out and the purpose for which the land in said "leased district" was leased and ceded to the United States was abandoned, the Choctaw and Chickasaw nations immediately presented their memorial to Congress, claiming the value or proceeds thereof as compensation for their reversionary or equitable interest in said land, and said claim, together with the claim of the Wichitas and affiliated bands of defendant Indians in this case, was referred to the Court of Claims and to this court for adjudication.

Said act of March 2, 1889, presented the first occasion when it was necessary for the Choctaws and Chickasaws to assert their rights and interest in said "leased district," and it was immediately done by memorials to Congress and a petition to the commission organized under said act. (See H. R. Report No. 3147, 51st Cong., 2d sess.)

The question, therefore, that arises is whether by the treaty of 1866 the cession to the United States of the land lying between the 98th and 100th degrees of west longitude was an *absolute* cession of all the rights and equities of the

Choctaws and Chickasaws therein, or whether it was a cession of those lands to the United States *in trust*, to be used for the colonization thereon of other Indians, in accordance with the expressed intention and settled policy of the United States, to which I shall hereinafter again refer.

The contentions of the Choctaws and Chickasaws are :

(*a.*) That the provisions of article 3 of the treaty of 1866, taken in connection with the other provisions contained in said treaty, and viewed in the light of the conditions and circumstances that induced its promulgation, constitute, not an absolute cession of said leased district, but a cession in trust for the colonization of Indian tribes thereon, and that upon failure of the United States to carry out the purpose for which said lands were ceded, the title thereto reverts to the Choctaws and Chickasaws, and if the lands are sold they should receive the proceeds thereof; and—

(*b.*) That if these provisions of article 3 do constitute an absolute conveyance of said lands by the Choctaw and Chickasaw Indians to the United States, divested of all equities and trusts in their favor, said language should be so reformed or construed that all the rights and equities claimed by said Indians, and obviously intended to be secured to them, shall be embraced therein, the omission so to provide being due to mistake and inadvertence on the part of the officers who prepared said treaty.

II.

JURISDICTION.

In this connection I may say that it is manifest from all the antecedent history of this matter, to which I shall presently refer, and from the language of the act of March 2, 1895 (28 Stat., 898), conferring upon the Court of Claims and this court jurisdiction of the case at bar, that it was the

intention of Congress to confer upon the court jurisdiction to hear and determine this whole subject-matter in all its legal and equitable aspects. The language of the act is:

"Jurisdiction be, and the same is hereby, conferred upon the Court of Claims to hear and determine said claim of the Choctaws and Chickasaws, and to render judgment thereon, it being the intention of this act to allow the said Court of Claims jurisdiction so that the rights, *legal and equitable*, of the United States and the Choctaw and Chickasaw nations and the Wichita and affiliated bands of Indians in the premises shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim."

And it is in view of the above that I earnestly request of the court that broad and liberal construction and interpretation of the language of the various treaties, and the circumstances and conditions relating thereto and connected therewith, that by all principles of justice and equity and by the expression of this court in cases to which I shall hereinafter call its attention, the claimant Indians in this case, the Choctaw and Chickasaw nations, have a right to expect.

III.

RULE OF CONSTRUCTION OF INDIAN TREATIES.

At this point I venture to call attention, merely for the convenience of the court, to a very familiar and well-settled rule in the construction of treaties made with the Indians, and to which I have alluded above. I select from the language of this court in the case of the *Choctaw Nation vs. The United States*, known as the "Net Proceeds case" (119 U. S., 27, 28), the following:

"As was said by this court recently in the case of the *United States vs. Kagama*, 118 U. S., 375, 383: 'These Indian tribes are the wards of the nation; they are communities

dependent on the United States, dependent largely for their daily food, dependent for their political rights.' * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by Congress and by this court whenever the question has arisen.

"It had accordingly been said in the case of *Worcester vs. Georgia*, 6 Pet., 515, 582: '*The language used in treaties with the Indians should never be construed to their prejudice.* If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * *How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.*'"

See, also, Vattel's Law of Nations, Book 2, c. 17, § 289.

While the Indian tribes are recognized, in a measure, as separate nations, they have universally been held to be dependent nations, the "wards of the United States," and, as such, are subject to all the rules governing transactions between guardian and ward; and this principle is peculiarly applicable to a treaty between Indians and the United States, because in the case of such a treaty the rule has always been to inquire as to "how the Indians themselves understood it" (*Holden vs. Joy*, 17 Wall., 243).

In the recent case of *Geoffroy vs. Riggs* (133 U. S., 258, 271), this court, speaking of treaties generally, says:

"It is a general principle of construction with respect to treaties that they shall be *liberally construed*, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense imposed upon them by local law, except such restricted sense is clearly intended."

It will be noticed that in article 3 the leased district is simply "ceded" to the United States. It is not in terms ceded "in fee-simple" or "absolutely" or in any other term that would indicate an absolute cession of all the interest of the Choctaws and Chickasaws in said lands. The word "cede" is said by Bouvier to be applicable to the act by which one State or nation transfers territory to another. As the character of this cession is not expressly stated in article 3, it must be assumed to have been one made in furtherance of the purpose, as stated in other sections of the articles of the treaty of 1866 itself; in the representations of the Commissioner of Indian Affairs to the Indians assembled at Fort Smith, and in the unsigned treaty of 1865, to which I shall hereinafter more particularly refer.

This court is now called upon to construe a treaty made with this "unlettered people"—this people who were ignorant not only of the refinements of our language, but of the language itself—in which more than 7,700,000 acres of their land, worth more than $9,000,000, are being dealt with. By former treaties with them, and by the patent issued in pursuance thereof, they were to hold this land in fee-simple so long as they remained a nation and continued to live upon it; they were to have absolute jurisdiction over it and over all persons and property within its limits; no other tribe or nation of Indians and no other people could domicile themselves thereon, and not even the United States could create a State or territorial form of government over it without their consent. The United States desired to procure a location for other Indian tribes that had been situated within the States, and instituted the negotiations which resulted in the accomplishment of what is set forth in the seven propositions above alluded to, the most conspicuous of which was that the United States should be allowed the privilege of colonizing other Indian tribes upon the lands belonging to the nations treated with.

Whatever may have been the form of expression actually

used in the submission of this matter to the delegates of the tribes assembled at Fort Smith, one thing is certain, and that is that the agents of the United States impressed it upon these Indians that what was sought to be accomplished was the procurement by the United States of this right to locate other Indian tribes upon the territory so alleged to have been ceded by the third article of the said treaty of April 28, 1866; and it is equally certain that this is all that the Indians intended to give, and did actually give, to the United States as a result of these negotiations.

When, therefore, the court is called upon to construe this treaty under the rule it has laid down, it would seem to be impossible, in the light of the language contained in the 10th and 45th articles thereof, and in the light of the history of this matter, to hold otherwise than that it was the evident understanding of the claimants in this case that they were simply granting to the United States what the commission that was appointed to consult with them said the United States desired, to wit, the right to locate other Indian tribes upon the part of their lands known as the "leased district," and this they did in consideration of the above-mentioned provision for the care and removal of their freedmen or former slaves.

This, I respectfully submit, is the only fair and reasonable interpretation of the language contained in article 3 of said treaty under the rule for the interpretation of such treaties laid down by this court, and for the further reason that it is also a well-settled rule of law that while the language of an instrument such as this cannot be changed by parol evidence, yet it is equally true that, in the event of controversy or doubt as to the meaning and effect of any of the provisions contained therein, all the facts, conditions, and circumstances surrounding the preparation of the instrument and the purposes to be attained by such language may be shown, in order that the court may occupy precisely the same position that the parties themselves occupied at the time of the

execution of the instrument in controversy, and from these facts and circumstances interpret the language thus employed in consonance with the intention of the parties.

IV.

TREATY OF 1866.

As this court is called upon to determine the effect of the treaty of 1866, which is contended by the Government to be an absolute cession of the "leased district" to the United States, and which it will be my purpose to show was a cession in trust, or that it should be reformed or construed so that it will become such, it is essential that the court should familiarize itself with the conditions that induced the parties to enter into the stipulations therein contained.

It will be remembered that article 9 of the treaty of 1855, in leasing to the United States the right to locate other Indians upon the lands embraced within the country between the 98th and 100th degrees of west longitude, contained a limitation of that right; in other words, the grant to the United States of said right expressly excluded "all the Indians of "New Mexico, and also those whose usual ranges are at "present north of the Arkansas river." It will also be noticed that the territory so leased was "to remain open to settlement by Choctaws and Chickasaws as heretofore," and the foreign Indians were to be "subject to the exclusive con- "trol of the United States under such rules and regulations, "*not inconsistent with the rights and interests of the Choctaws* "*and Chickasaws*, as may from time to time be prescribed "by the President for their government," etc. Under this provision the Choctaws and Chickasaws continued to legislate for their own citizens who preferred to remain upon said land.

When the civil war occurred a majority of the Indians in the Indian Territory, most of whom were slave-holders,

elected to cast their fortunes with the South, and the attorney for the Government has produced and printed in the record (p. —) a treaty with the Confederate government. During the war they naturally suffered as a result of the conflict and became greatly impoverished. In fact, their condition became so desperate that when it was brought to the attention of the Government of the United States, at the close of the war, representatives of the various tribes or nations of Indians in the Indian Territory were convened at Fort Smith, in the month of September, 1865, when were submitted to the assembled delegates the seven propositions referred to in the foregoing statement of facts, and which are as follows:

"1st. That such tribes must enter into a treaty for permanent peace and amity among themselves, with each other as tribes, and with the United States.

"2d. The tribes settled in the Indian Territory to bind themselves, at the call of the United States authorities, to assist in compelling the wild tribes of the plains to keep the peace.

"3d. Slavery to be abolished and measures to be taken to incorporate the slaves into the tribes, with their rights guaranteed.

"4th. A general stipulation as to final abolition of slavery.

"*5th. A part of the Indian country to be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein.*

"6th. That the policy of the Government to unite all the Indian tribes of this region into one consolidated government should be accepted.

"7th. That no white person, except Government employés, or officers or employés of internal improvement companies authorized by the Government, will be permitted to reside in the country, unless incorporated with the several nations."

It will be seen from the above that one of these propositions (the fifth) was in pursuance of the policy that the

Government of the United States had marked out many years before and has adhered to until a very recent day.

In his report of 1864, as already stated, the Commissioner of Indian Affairs had urged "the importance of preserving "the Indian country *for the use of the Indians alone*, and, if "need be, enforcing such terms (in treaties) as will secure "ample homes within that country for all such tribes as "from time to time it may be found practicable and expe "dient to remove thereto." This being considered an opportune time to obtain from the Choctaws and Chickasaws their consent to the removal of the limitation that existed in article 9 of the treaty of 1855, and to which I have referred, and for obtaining from the other Indians assembled at Fort Smith their consent to the location of foreign Indians upon their land, the Hon. D. N. Cooley, in presenting the substance of these five propositions to the Indians so convened, stated to them:

"A portion of the lands hitherto owned and occupied by you must be set apart for the friendly tribes now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government, or such as may be fixed by the Government."

This speech was addressed to the representatives of no particular nation or tribe, but to them all, as hereinbefore stated. It was as a result of this that what is known as the unsigned treaty of 1865 was drawn, as hereinbefore stated by the terms of which it was clearly indicated that the Choctaw and Chickasaw tribes must agree "to a *modification* "of the 9th article of the treaty concluded in the city of "Washington the 22d day of June, A. D. 1855, by which "they agreed that all of that portion of their common ter "ritory west of the 98th degree of west longitude leased to "the United States may be used for the permanent settle "ment of the Wichita and such other tribes and bands of "Indians as the Government may desire to locate thereon

"*without exception or restriction as to the character of the "tribes.*"

As will be seen hereafter, treaties similar to the one of 1866 with the Choctaws and Chickasaws were made with the Cherokees, Seminoles, and Creeks, in which cessions as absolute on their face as the one in the case at bar were made of the lands of these Indians to the United States. I shall hereafter refer to the action taken by the Government of the United States with regard to the claims set up by the latter Indians under these treaties, and from which it will be seen that upon the opening to settlement of their lands they were duly paid the difference between the amount for which they were sold and the amount paid them under the various treaties resulting from the convention of 1865.

See N. Y. Indians *vs.* U. S., 170 U. S., 30, 31.

As already stated, in the "leased district" of the Choctaws and Chickasaws are embraced 7,713,239 acres of land, which were undoubtedly worth at the very least as many dollars as there were acres contained therein, and for the cession in article 3 of said treaty of 1866 the United States paid $300,000, and this upon the condition that if the Indians did not within two years pass certain laws for the benefit of their freedmen the money was to cease to be held in trust for them, but was to be held for the use and benefit of such freedmen as the United States should remove from said Territory.

It is most respectfully submitted that it is inconceivable that these Indians who were the owners of this land, as to which the United States had stipulated that it should never be brought within the jurisdiction of any State or Territory, would cede away the country they had thus acquired in such a manner as to part with their rights in and control over the same for an amount equal to not exceeding three cents an acre; and it is also inconceivable that the United States should attempt to evade or get rid of these treaty

stipulations without fully and fairly advising the Indians of such intent and purpose. It is still more inconceivable that the United States would attempt to procure from these Indians for the nominal consideration of $300,000 (even if the Indians were to get the benefit of it, which they were not) all their rights in and title to the lands embraced in this leased district, aggregating more than 7,000,000 acres, of the value of more than $9,000,000.

Now, keeping in mind the conditions prior to and at the time of the making of the treaty of 1866, it becomes important also to bear in mind the purpose the United States had in view, as avowed, in entering into the negotiations which resulted in the said treaty of 1866. Whether the object to be accomplished was expressed in the form of the fifth of the seven propositions that were circulated among the Indians in print, or whether it was as stated in the speech of Mr. Cooley, the Commissioner of Indian Affairs, it matters not. The purpose of the United States, as conveyed to the Indians, was clearly and indisputably not to purchase outright the title of the Indians to the lands owned by them for the sum of $300,000, but was simply to acquire the right to use the same for the settlement of such Indian tribes as it might choose to colonize thereon.

It had not entered into the minds of the commissioners, so far as can be gathered from anything that was said or done at the time, to acquire any other right than that just expressed; and it certainly never entered into the minds of any of the persons representing the Indians that the United States had any other purpose in view, or that anything else was being done than simply the acquiring of the right to colonize other Indian tribes within this leased district; and this is enforced and made apparent by the provisions of article 3 of the said treaty of 1866, by which the said alleged cession was made, in respect to the disposition of the consideration that was to be paid to the claimants herein for this right.

An analysis of the provisions of the said article (which need not be here entered upon in detail, because it will be elsewhere presented) will show that in point of fact this amount of $300,000 was not to be received by the Choctaws and Chickasaws for any use or benefit resulting to themselves, but was to be devoted to the removal of their freedmen or former slaves from the nations. In other words, this $300,000 was not intended to be paid as a compensation for the more than 7,000,000 acres of land that were being ceded, but was simply created and set apart as a fund to be devoted to certain specific objects and for the benefit of persons who were not citizens of either the Choctaw or the Chickasaw nations—this in consideration of the right to locate other Indian tribes upon a part of said land.

These freedmen were persons for whom the United States, and possibly the Choctaws and Chickasaws, desired to make provision. They were not citizens of the nations, and had no ownership in their property, and this provision was manifestly made for their benefit in order to effect a change in the condition of these dependent people.

This being so, it is inconceivable that it could have been understood, either by the United States or by the Choctaw and Chickasaw nations, that they were parting with their entire interest in this vast tract of land for the sum of less than three cents an acre, or were doing anything more than simply granting to the United States, in consideration for this provision for the removal and benefit of their former slaves, the right to use this leased district for the further colonization of other Indian tribes therein.

That this is so further appears from an examination of other provisions of said treaty. By article 10 thereof the United States reaffirm all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaws and Chickasaws entered into prior to the late rebellion and not inconsistent with the treaty. Among the obligations that the United States had entered into with

regard to these nations was that the Choctaws should hold this land in fee; that no other Indians or persons should be permitted to reside thereon without their consent; that they should have absolute control and dominion over it, and that it should never be brought within the limits of any State or Territory.

Article 45 of said treaty preserves to the Choctaws and Chickasaws all the rights, privileges, and immunities theretofore possessed by said nations, or by individuals thereof, or to which they were entitled under the treaties and legislation theretofore made in connection with them. All these rights are declared to be in full force so far as not inconsistent with the other provisions of the treaty. Both of the last-named articles contain, in substance, the provision that the rights, privileges, immunities, &c., that existed prior to the execution of the treaty, and that are not inconsistent with the provisions thereof, shall remain in force, and this provision that they shall not be inconsistent only strengthens our contention that this was not an absolute cession to the United States of the lands named in the said third article, and this because if the cession was an absolute one, intended to dispose of this leased district absolutely and without restriction or limitation, there could not be any obligations, rights, privileges, and immunities with regard to this land that could be reaffirmed and continued by said articles 10 and 45, and these words would be inoperative and meaningless.

If this was an absolute cession, then the dominion and control of the Choctaws and Chickasaws over the lands involved therein would be taken away from them altogether. The absolute right to, and dominion over, said lands would be in the grantee, and there could not remain any rights, privileges, and immunities in the Choctaws and Chickasaws to which the language contained in said articles 10 and 45 could refer. The fact, therefore, that these rights, privileges, and immunities are reserved to the claimants by these two

articles of said treaty shows conclusively that neither these Indians nor the United States understood that by the language contained in said article 3 the Choctaws and Chickasaws were doing anything more than simply conferring upon the United States, in consideration of said provision for the benefit of their freedmen, the right to use this land for the colonization of other Indian tribes thereon; and the language contained in said articles 10 and 45, as we have said above, would be utterly useless and meaningless if the language contained in article 3 is interpreted to be an absolute cession, unless there can be imputed to the United States the intention, by the use of the language reserving the said rights, privileges, and immunities, to mislead and deceive the said Indians to their prejudice.

But, in addition to this, it is not inconsistent with the language contained in the third article of said treaty so to construe it as that the lands mentioned therein are ceded in trust and not absolutely, and one of the reasons of this is that, while the language of said alleged cession is broad and general, yet the application of the consideration paid therefor shows that this sum of $300,000 was not paid as a consideration for the lands, as we have already attempted to show, but was made as a provision for the benefit of others, and in no sense for the benefit of either the Choctaw and Chickasaw nations or the individuals composing them, which individuals, by the terms of the treaty of 1855, were in point of fact the owners of this property.

And if, as is attempted by the Government in this case to show, the United States had acquired and intended to acquire the full title to this immense domain of 7,713,239 acres of land acquitted of all claim of the Choctaws and Chickasaws, it is uncommonly strange that no exception was made as to what was written into the tenth and forty-fifth articles of said treaty of 1866. The absence of such an exception from said articles of said treaty furnishes additional evidence that the United States Commissioners knew they had made no such bargain.

V.

INTERPRETATION OF THE TREATY OF 1866 BY THE PARTIES THERETO.

The interpretation of the cession of 1866 for which we contend in this case is the one that has actually and uniformly been placed upon it by both of the parties thereto, and until the recent effort of the United States to throw open these lands to settlement the character of said cession as a cession in trust for the purposes above stated was never questioned.

In the first place, the Indians who made the cession understood it to be a conveyance in trust for those purposes; and in the next place, the United States, through the various officers who have from time to time had the subject under consideration, have so construed it. All of the Government officers who have had any occasion to administer said treaty, or who have had occasion to express in any form an interpretation of the language in question as affecting the rights of the Indians, have interpreted it as a cession in trust.

"The principle that the contemporaneous construction of "a statute," says this court in the case of *Pennoyer vs. McConnaughy* (140 U. S., 1, 23), "by the executive officers of "the Government whose duty it is to execute it is entitled "to great respect and should ordinarily control the con- "struction of the statute by the court, is so firmly imbedded "in our jurisprudence that no authorities need be cited to "support it." (See also *Jopliff vs. Jopliff*, 122 U. S., 131; *United States vs. Philbrick*, 120 U. S., 52, and *United States vs. Hill*, 120 U. S., 169, 180.)

The following are instances of this interpretation by the officers of the Government of the United States charged with the duty of construing the language in said act and administering the treaty:

1. On the 14th of June, 1866, shortly after the treaty with the Choctaws and Chickasaws, the Government made a treaty with the Creek nation of Indians (14 Stats., 785), by which these Indians ceded to the United States the west half of their entire domain, containing 3,250,560 acres of land. The Cheyennes and Arapahoes were colonized on a part thereof by executive order, but a part of the lands so ceded by the Creeks remained unoccupied. In 1871 Congress passed an act which prohibited the further colonization of Indians on unoccupied lands in the Indian Territory except with its consent (— Stats., —). In 1879, persons having gone on these unoccupied lands who were not entitled under the treaties and law to be on the same, the question was raised as to the right of the Government to expel them as intruders, and on the first of May, 1879, the Secretary of the Interior, in response to an inquiry by the Secretary of War, was brought to a consideration of the question as to the status of such lands.

Mr. Schurz, the then Secretary of the Interior, in a communication to the Secretary of War in reply to the abovementioned inquiry, among other things, in speaking of the Choctaw and Chickasaw lands, and referring to the 9th article of the treaty of June 22, 1855, after having gone over the antecedent history, informed the Secretary of War that the lands ceded by the Choctaws and Chickasaws were by said article 9 *leased to the United States for the purpose of the permanent settlement of the Wichita and such other bands of Indians as the United States might desire to place thereon;* and, further, that "the treaty of 1866 substituted a direct purchase for the lease, *but did not extinguish or alter the trust.*" Here, then, the first time that any question arose as to the status of the lands in controversy, the Secretary of the Interior expressly interpreted the treaty of 1866 to be a continuation of the trust (created by the treaty of 1855) in the United States for the settlement of other Indian tribes thereon.

2. About this time one Payne, a citizen of the United States, conceived the idea of settling upon these lands that were still unoccupied by the Indians and upon which no Indians had yet been located, claiming that they were subject to settlement under the land laws of the United States. He accordingly organized an expedition, and entered upon these lands with a view to such settlement. On the 12th of February, 1880, as a consequence of the above-mentioned invasion, the President of the United States issued a proclamation, in which he said that *the lands were subject only to the occupation of Indian tribes*, officers of the Indian Department, military posts, and such persons as might be privileged to reside and trade therein under the intercourse laws of the United States, and proceeded to warn and notify all persons who proposed to enter upon said lands that they would be speedily removed, and stated that, if necessary, the aid and assistance of the military force of the United States would be invoked for that purpose.

This could not be if the United States, by the treaty of 1866 with the Creeks, had become the absolute owner of these lands. There was no law in existence that would have authorized the President to make it unlawful for persons who might desire to do so to enter upon the public lands, or if any did so, to remove them therefrom; and therefore these lands were thus again recognized by the Executive as held by the United States in trust for the specified purpose mentioned in the treaty.

In pursuance of the proclamation of the President above referred to, the said Payne was removed from the lands upon which he had entered. Having subsequently returned, he was arrested, indicted, tried, and convicted for said offense in the district court for the western district of Arkansas. Judge Parker, before whom the case was tried, held that "*the moment the Government purchased the land, and by the same simultaneous act with such purchase, it reserved it for a specific purpose. That purpose was the same as the one*

for which the land had been used for thirty-three years, ever since the Creek treaty of the 14th of February, 1833;" and he further held that this Indian country was obtained by the Government *for Indian occupancy*, and proceeds to show that the lands having been procured for such a purpose they could not be used for any other purpose.

3. On the 7th of February, 1882, the Senate of the United States passed a resolution calling upon the Secretary of the Interior for information concerning the right of settlers to occupy any part of the Indian Territory. On the 17th of the same month the then Secretary, the Hon. S. J. Kirkwood, transmitted to the Senate a communication from the Commissioner of the General Land Office upon the subject. Necessarily it involved a consideration of the question as to the status of the lands of which the leased district is a part under the existing treaties. In this communication the Commissioner says that there are no lands in the Indian Territory open to settlement or entry by freedmen or any other persons under the public land laws of the United States. He then proceeds to state in detail the history of these lands, and, referring to the treaties with the Choctaws, Chickasaws, Seminoles, and Creeks, says of the said treaty of April 28, 1866, with the claimants herein, that *the cession was by the 10th article thereof made subject to the conditions of the compact of June* 22, 1855, *by the 9th article of which it was stipulated that the lands should be appropriated for the settlement of such tribes or bands of Indians as the United States might desire to locate thereon.*

The Commissioner also holds that the lands embraced in the Choctaw and Chickasaw cession were also included in a definite district established by the stipulations of the said treaty of 1855, pursuant to the act of Congress of May 28, 1830, the United States engaging by the seventh article of such treaty to keep out from that district all intruders. He further says that "in pursuance of the stipulations of the

foregoing compacts, and in the exercise of the trusts assumed by the United States under the several treaties, and in accordance with the provision of law and the lawful orders of the President, all the lands in the Indian Territory to which the United States has title have been permanently appropriated or definitely reserved for the uses and purposes named."

Again he says:

"*The title of the United States to lands in the Indian Territory is, as heretofore shown, subject to specific trusts, and it is not within the lawful power of either the legislative or executive departments of the Government to annihilate such trusts or to avoid the obligations arising thereunder.*"

It is thus seen that at this time the officials of the United States having such matters in charge, in interpreting this treaty of 1866 with the Choctaws and Chickasaws, so construed it that the United States were held to have received these lands in trust for the purpose specified; that this conveyance was made for the purpose of carrying out a scheme or plan which the United States had long before adopted, of bringing the various tribes or bands of Indians who were located in the various States into this region of country and permanently settling them there, with the consent of the Indians who were the owners of the country to which they were so removed, and of thus putting an end to the strife and the offensive features incident to their residence in the States, and that it was for this purpose alone that the transfer to the United States that is contained in said article 3 was made.

Therefore that conveyance had impressed upon it the trust that the lands should be used for the purpose aforesaid, and, when they ceased to be so used, or when that scheme of the United States was abandoned, then all the rights that the Choctaws and Chickasaws theretofore had were revived, or, rather, they were preserved to them by

the provisions of the tenth and forty-fifth articles of the said treaty, hereinbefore referred to.

4. Again, on the 23d of January, 1884, the Senate of the United States called upon the Secretary of the Interior for information in respect of the status of the lands in the Indian Territory other than those claimed and actually occupied by the five civilized tribes. Under date of the 31st of the same month, the then Commissioner of Indian Affairs, the Hon. Hiram Price, elaborately considered this question, reviewed the treaties with the Choctaws and Chickasaws, and concluded as follows:

"This being the condition of things, it is clear that no authorized settlement could be made by any persons in the Territory, except under the provisions of the intercourse laws, such persons having first obtained the permission provided for in these statutes. It may be further stated that *no part of said Territory remains free from appropriation either to a direct trust by treaty or by reservations for tribes thereon under executive order.*"

5. The then Secretary of the Interior, the Hon. H. M. Teller, in his communication transmitting this opinion of the Commissioner of Indian Affairs to the Senate, says:

"These lands were acquired by treaties with the various Indian nations or tribes in that Territory in 1866, *to be held for Indian purposes*, and to some extent for the settlement of the former slaves of some of said nations or portions thereof. *Such are the purposes for which such lands are now being used or held according to the common understanding of the objects of the treaties by which they were acquired*, and from this arose the necessity for the obligation to keep such lands in their present condition of occupancy or otherwise."

6. On the 1st of July, 1884, President Arthur issued another proclamation, reciting, in the preamble, that—

"Certain persons have, within the territory and jurisdiction of the United States, begun and set on foot preparation

for an organized and forcible possession of and settlement upon the lands of what are known as the Oklahoma lands in the Indian Territory, which territory is designated, recognized and described by the treaties and laws of the United States, and by the executive authorities, as Indian country, and as such is subject to Indian occupation only. * * *

"Now, therefore, for the purpose of properly protecting the interests of the Indian nations and tribes in said territory, * * * I do admonish and warn all persons intending or preparing to remove upon said lands or into said Territory, against any attempt to so remove," &c.

7. Again, on the 23d of January, 1885, the Senate of the United States, by a resolution, inquired of the Department of the Interior as to the status of lands in the Indian Territory. In response to this resolution the Secretary of the Interior, among other things, says:

"Objection will be made to the occupation of any part of the Indian Territory by others than Indians, on the ground that the Government set apart the Territory *for the exclusive use of the Indians* and covenanted that no others should reside therein. *It is not denied that the treaties so provide.*"

It is, however, in this communication, suggested by the Secretary that—

"It is within the power of the Government, *with the consent of the Indians interested*, to change this provision of the treaties so that these lands may be within the reach of settlers, and steps should be taken at once to change the present condition of affairs in the unoccupied portion of the Indian Territory. It can be done without violating the treaties, or without subjecting the Government to the charge of bad faith."

8. Again, on the 28th of January, 1885, the President of the United States, in response to a resolution of the Senate requesting him to advise the Senate as to the status of the lands in question as viewed by the Executive (this growing out of the proposed use of military force for the purpose of

expelling intruders from these lands), among other things, says:

"None of the land or general laws of the United States have been extended over these lands, except as to the punishment of crimes, &c. It is clear that no authorized settlement can be made by any person in the Territory in question until the existing status of these lands shall have been changed by agreement with the Indians interested, or in some other manner as may be determined by Congress. The treaties heretofore made with the Indians should be maintained, and the power of the Government, to the extent necessary, should be used to keep off intruders and all other unauthorized persons."

9. Again, on the 26th of January, 1885, the Commissioner of Indian Affairs reviews this whole subject, and reiterates in substance what has been before said, to wit, that these lands are held by the United States in trust to carry out the scheme for the colonization of Indian tribes thereon which has been above explained.

10. As a result of this constant agitation in Congress touching the status of these unoccupied lands in the Indian Territory, and of these repeated efforts to subject them to private ownership in opposition to these repeated assertions that they were held by the United States in trust for the settlement of Indians and could not be occupied otherwise, and it becoming apparent that something should be done pursuant to the suggestions that had been made by the Department of the Interior, the Congress of the United States, in 1889, passed an act providing for the appointment of a commission to negotiate with the Cherokee Indians, "and with all other Indians owning or claiming lands lying west of the 96th degree of west longitude in the Indian Territory, for the cession to the United States of all their title, claim or interest, of every kind or character, in and to said lands" (25 Stats., 1005).

Thereupon the Choctaws and Chickasaws appointed delegation to meet these commissioners for the purpose negotiating with them with reference to the disposition their interest in the lands in controversy in this case, a they set forth their claim to the said commission as n contended for. Afterwards, on the 31st of March, 1890, th also presented their said claim, by a memorial in that half, to the Senate and House of Representatives of t United States. This memorial having been referred to t Committee on Indian Affairs of the House, it was in tu referred by that committee to the Department of the Inter for information, and the acting Commissioner of Indi Affairs submitted a report to the committee, in which reviewed all the treaties made between the Choctaws a Chickasaws and the United States and the proceedi which led up to and resulted in the treaty of April 28, 18 with these Indians. He also discussed the provisions this treaty, and informed the committee that he was opinion that the Choctaw and Chickasaw Indians—

"*have good ground for the claim that the United States t the lands ceded by them upon the trust to settle other Indi and freedmen thereon, as the policy upon which the negotiati were made clearly indicated its desire and purpose to* * * * While there are clearly no words of limitation the treaty of 1866 as to the use to which the ceded la should be put by the United States, *the history of the negot tions preceding and resulting in that treaty, and the subsequ treatment of the subject, quite clearly indicate that the Choct and Chickasaws have good ground for claiming that they und stood that the lands were to be used for the location of other dians and freedmen thereon.* If they have, as seems to be case, an equitable claim, it is for Congress to determine wh shall be the measure or allowance to be made for its adju ment in order to clear the lands of the encumbrance."

Having shown by the above instances the uniform int pretation of this treaty of 1866 by the officials of the exe tive branch of the Government in the way for which we

contending, I now turn to the legislative interpretation thereof and invite the attention of the court to the following examples of the treatment of this question by the Congress of the United States:

VI.

LEGISLATIVE DECLARATION AND INTERPRETATION.

Of absolutely conclusive force and effect, however, is the legislative declaration of the Congress of the United States as to the character of this cession, expressed in the Indian appropriation act of March 3, 1891 (26 Stats., 989), which was occasioned by the assertion of a claim by the Choctaws and Chickasaws arising as follows:

Among the tribes and bands of Indians settled on the leased district of the Choctaws and Chickasaws under the treaty of 1866 were the Cheyennes and Arapahoes. In 1891, in pursuance of the change in the policy of the United States to which I have above referred, it was proposed to open these Cheyenne and Arapahoe lands to settlement under the public land laws. The claim of the Choctaws and Chickasaws for compensation for their reversionary or equitable interest in these lands was duly presented to Congress by memorial, and was carefully considered by the committees of the Senate and House of Representatives and in conference, and in the act of the 3d of March, 1891, above mentioned (see p. 1025, 26 Stats.), after providing for the allotment of the Cheyenne and Arapahoe lands, there is appropriated $2,991,450 to pay the Choctaws and Chickasaws for their equitable interest therein. Said provision is as follows:

"And the sum of $2,991,450 be, and the same is hereby, appropriated out of any moneys in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw nations of Indians for all the right, title, interest and claim which said nations of Indians may have in and to certain lands now occupied by the Cheyenne and Arapahoe Indians

under executive order; said lands lying south of the Canadian river, and now occupied by said Cheyenne and Arapahoe Indians. *Said lands have been ceded in trust by article 3 of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians which was concluded April 28, 1866, and proclaimed on the 10th day of August of the same year*, and whereof there remains, after deducting allotments, as provided by said agreement, a residue ascertained by survey to contain 2,383,160 acres."

It is respectfully submitted that by this statute the character of the cession of 1866 is definitely fixed. It is expressly declared by the Congress of the United States, after full and careful inquiry and consideration, to have been a cession "in trust;" and, as will be seen, upon the abandonment by the United States of the purpose for which such trust was created, the right of the Choctaws and Chickasaws to compensation for their reversionary and equitable interest in said lands was duly recognized. Indisputably, any defect or omission to express the intent of the parties in the treaty of 1866 was thereby cured. In this connection the following considerations are involved:

(*a.*) The act of the 3d of March, 1891, is a statute *in pari materia* with the treaty of 1866, and must control the construction to be placed upon said treaty. It relates to precisely the same subject matter. The lands of the Cheyennes and Arapahoes (to pay for the reversionary interest of the Choctaws and Chickasaws in which said appropriation was made) were a part of the same leased district that is involved in the case at bar. The statute was enacted to compensate the same nations of Indians for the identical interest that they are setting up in the present case, and the act was intended to and did fix the character of the cession of 1866 here in question. No two subjects-matter could be more nearly related.

In the case of *Alexander vs. Mayor of Alexandria* (5 Cranch, 7, 8), the court says:

"It is to be observed that acts *in pari materia* are to be construed together as forming one act. If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. *Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated in the foregoing act, is a direction to the courts in expounding the provisions of law.*"

See the same thing, held in—

Doe vs. Winn, 11 Wheat., 386.
Pollard vs. Kibbe, 14 Pet., 366.
United States vs. Freeman, 3 How., 564.
Converse vs. United States, 21 How., 463.
United States vs. Walker, 22 How., 299.
Railroad vs. United States, 127 U. S., 406.
Vane vs. Newcombe, 132 U. S., 235.

It would be useless to cite further authorities upon a proposition so fundamental.

As will be presently seen, the same principle applies to the construction of treaties or to a subsequent act of Congress relating to the subject-matter thereof. They must be construed together and the latest expression of the legislature must prevail.

(*b.*) The payment of the Choctaws and Chickasaws for their interest in the lands occupied by the Cheyennes and Arapahoes is a subject-matter that was perfectly competent for Congress to legislate upon, because the act so passed dealt with the public lands over which Congress has the supreme and exclusive control, as it has over the Indians themselves, and this legislation was, moreover, in favor of the interests of the Indians.

(*c.*) The declaration in the act of 1891 was strictly pertinent, and germane to the matter of the appropriation there made, and was a matter to which the attention of Congress was of necessity specifically and especially called. In short, the declaration was necessary in order that the purpose for which the appropriation was made should be shown, and it could not, therefore, be mere recital or opinion concerning a matter not germane to the subject of legislation, and as such only entitled to consideration as evidence of the matter recited.

On this point I respectfully request the attention of the court to what is said in Sutherland on Statutory Construction (sec. 231, p. 306):

"A provision which is special by pointing to a particular act and declaring for what definite purpose it was enacted, or defining certain words or phrases, has the *fullest* effect. *It is a part of the law and must be construed and applied accordingly, and the act will have a construction, and the words and phrases a meaning, in harmony with the defining provisions, even though otherwise they would have a different effect.*" (See cases cited in Note 2.)

This principle is thus stated in Endlich on the Interpretation of Statutes, § 365, pp. 510, 511:

"The right of the legislature to prescribe the legal definitions of its own language must be conceded. Moreover, a statute declaratory of a former one has the same effect upon the construction of the former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage."

In the note to the above, the author cites many of the cases cited in Sutherland to the same proposition.

(*d.*) While the principles above quoted purport to relate to the construction of *statutes*, they are, of course, equally applicable to the construction and interpretation of treaties or of statutes and treaties relating to the same subject-matter

(26 Am. and Eng. Ency. Law, 555). As stated in the American and English Encyclopædia of Law (vol. 26, p. 546), "no distinction is made between treaties made under au-"thority of the United States and the laws of Congress, but "both are declared to be the supreme law of the land; con-"sequently, when in conflict, being of equal dignity, effect "is to be given to the later as the last expression of the "law-making power."

This court, in the case of *Whitney vs. Robertson* (124 U. S., 194), says:

"If the treaty contain stipulations which are self-executing—that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. *Congress may modify such provisions so far as they bind the United States, or supersede them altogether.* By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, *if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.*"

The court, after repeating that "the duty of the courts is to construe and give effect to the latest expression of the sovereign will," quoting from the *Head Money cases* (112 U. S., 580), continues:

"So far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, *it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.*"

It will be seen from the above decision that, even in the case of inconsistency or absolute repugnance between a treaty and subsequent legislation upon the same subject,

the courts will give effect to the one last in date as controlling the other. In the case at bar, as I have above endeavored to show, there is no real repugnance between the language that constitutes the cession in the third article of the said treaty of 1866 and the language contained in the said act of 1891. The latter is a direct legislative declaration of the character and effect to be given to said cession, and is one made in "enforcement" of the provisions of the said treaty.

As between the Choctaws and Chickasaws and the United States, it is respectfully submitted, the declaration by Congress of the character of the cession contained in the third article of the treaty of 1866 is *conclusive*. The act of 1891 must be construed with and, so far as this cession is concerned, taken to be a part of said treaty of 1866. It is not, however, the only legislative expression as to the character of said cession, and to some of the others I shall now briefly refer.

1. On the 20th of September, 1890, Mr. Peel, from the Committee on Indian Affairs of the House of Representatives, reported a bill from that committee (No. 12106, Fifty-first Congress, second session) which provided:

"That the sum of $6,211,714.65 be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, *to pay in full the Choctaw and Chickasaw nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in and to certain lands ceded in trust by article 3 of the treaty between the United States and said nations, concluded April 28th*, 1866."

Accompanying this bill was the unanimous report of the said Committee on Indian Affairs, in which is reviewed the entire history of this matter, and the conclusion is reached that "*there can be no reasonable doubt that the treaty of* 1866 *was intended by all of the parties thereto to be a cession in trust to the United States* for the location of other bands or tribes

of Indians upon the lands ceded thereby." No final disposition was made of this bill.

2. The appropriation in the act of March 3, 1891, to pay the Choctaws and Chickasaws for their interest in the lands that had been occupied by the Cheyennes and Arapahoes was made by said act immediately available, but upon one pretext or another payment was delayed. In December of the same year, Congress again convened, and on the 18th of February following, a communication was sent by President Harrison to the Senate and House of Representatives in which he quotes the provision of the appropriation act above set forth, and states that if it had been presented to him as a separate measure he would have vetoed it. Among other things he says that—

"After a somewhat careful examination of the question, I do not believe that the lands for which this money is to be paid were, to quote the language of section fifteen of the Indian appropriation bill, already set out, 'ceded in trust by article 3 of the treaty between the United States and the said Choctaw and Chickasaw nations of Indians, which was concluded April 28, 1866,'" &c.

The President then proceeds with an elaborate presentation of the history of these lands and of the relations of the Indians thereto.

This communication of the President was referred by the Senate and House of Representatives to their respective Committees on Indian Affairs. The Senate committee at that time was composed of the following Senators: Henry L. Dawes, chairman; Orville H. Platt, Francis B. Stockbridge, Charles F. Manderson, Richard F. Pettigrew, John T. Morgan, James K. Jones, George Hearst, and John W. Daniel. On the 15th of April, 1892, Senator Jones, of Arkansas, presented to the Senate the report of its said committee, in which the question now under discussion in this case was most fully and carefully considered. The commit-

tee reached the conclusion, as will more fully appear by reference to its report, that the lands ceded by the said treaty of 1866 and known as the leased district *were ceded to and held by the United States in trust, and that, upon the transfer thereof to citizens of the United States, the Choctaws and Chickasaws would have the right to regard such action as a forfeiture of the trust estate held by the United States therein, and would be entitled to compensation for the full value thereof.* (See Senate Report No. 552, 52d Cong., 1st sess.)

The views stated by the President in his said message to the Senate and House of Representatives in support of his contention that said lands were not ceded in trust are so fully answered in the above report of the Committee on Indian Affairs of the Senate that I content myself with submitting herewith a copy thereof, and requesting the especial attention of the court thereto. Answer to the position so taken by the President was also made in the elaborate memorials presented on behalf of the Choctaws and Chickasaws, copies of which we also herewith submit to the court. In these three documents this subject is so fully considered that I deem further argument unnecessary upon this branch of the case.

Accompanying the report of the Senate committee, to which we have just referred, was the following resolution:

"*Resolved*, That for reasons set forth in the report of the Committee on Indian Affairs upon the President's message of February 18, 1892, upon the appropriation of March 3, 1891, for payment to the Choctaw and Chickasaw nations for their interest in the Cheyenne and Arapahoe reservation, in the Indian Territory, submitted with this resolution, that *it is the opinion of the Senate that there is no sufficient reason for interference in the due execution of the law referred to.*"

This resolution was adopted by the Senate, after full discussion, on the 9th of May, 1892, by a vote of 43 to 13, as will more fully appear by reference to the proceedings of that body in that behalf.

3. The House of Representatives, whose Committee on Indian Affairs had made substantially the same report upon precisely the same resolution, subsequently adopted the said resolution by a vote of 163 to 47.

Thus it appears, as I have before said, that up to the time of this message to the Senate and House of Representatives by the President of the United States, no question had ever been made by either the executive, legislative, or judicial branches of the Government that the lands involved in this controversy were ceded to and held by the United States upon the clearly understood trust above indicated, and that upon the receipt of this message both branches of Congress almost unanimously resolved that in their opinion the views of the President were without justification, and that the contention of the Choctaws and Chickasaws was the correct and only reasonable one under the circumstances.

After this specific declaration by Congress, the money that had been appropriated to pay them for their interest in the lands that had been occupied by the Cheyennes and Arapahoes was paid, the interest thus paid for being, as above stated, precisely the same as that held by these claimants in the lands involved in this suit, which are now occupied by the Wichitas and affiliated bands, as they are called.

VII.

ACTION BY THE GOVERNMENT IN SIMILAR CASES.

The fact that the cession of 1866 was intended by the parties to said treaty to be a cession in trust of the leased district for the settlement thereon of such Indian tribes as the United States might desire to colonize in said country is made further apparent by the dealings of the Government with the other nations of Indians with which treaties had been entered into as a result of the convention at Fort Smith in 1865, and to these dealings I now invite attention.

THE CREEKS AND SEMINOLES.

The Creek nation of Indians, prior to their removal to the Indian Territory, occupied certain lands in the States of Georgia and Alabama, from which, as in the cases of the Choctaws and Chickasaws, the United States and the States of Georgia and Alabama desired their removal. The Seminoles, who once constituted a part of the Creek Nation, occupied certain territory in the State of Florida, from which it was likewise desired that they should be removed.

In pursuance of this desire on the part of the United States and the States, on the 12th of February, 1825, a treaty was entered into with the Creeks, by the first article of which these Indians ceded to the United States, absolutely, all their lands lying within the States of Georgia and Alabama. In exchange for the lands thus ceded the United States agreed to convey to the Creeks, an equal quantity of land, acre for acre, west of the Mississippi river, commencing on the Arkansas river at the mouth of the Canadian fork and running west between the Arkansas and Canadian fork for quantity. It was also stipulated that a deputation of Creeks should be sent to explore the country so offered in exchange, and that, if the same should not be acceptable to them, they should select other lands. These lands were accepted, however, and thus the Creeks acquired their lands in what afterwards came to be known as the Indian Territory.

On the 9th of May, 1832, the United States entered into a treaty with the Seminoles (7 Stats., 368), by which the Seminoles relinquished their land in Florida and agreed to emigrate to the country west of the Mississippi river ceded to the Creeks by the treaty of 1825; and on the 14th of February, 1833, another agreement or convention was entered into between the United States and the Creeks (7 Stats., 417), by which the boundaries of the said lands

lying west of the Mississippi were distinctly defined. By the third article of this treaty it is provided that "the United States will grant a patent, in fee-simple, to the Creek nation of Indians for the land assigned said nation by this treaty or convention whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall continue to said tribe of Indians so long as they exist as a nation and continue to occupy the country so assigned them," which is substantially the same provision that is found in the said treaty of 1830 with the Choctaws. By article 4 it is provided:

"The lands referred to shall be taken and considered the property of the whole Muscogee or Creek nation, * * * and it is also understood and agreed that the Seminole Indians of Florida shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek nation, and they, the Seminoles, will hereafter be considered a constituent part of the said nation, who are to be located on some part of the Creek country by themselves, which location will be selected for that purpose by the commissioners who have signed these articles of agreement."

Note here that, as in the case of the Choctaws and Chickasaws, the Creeks and Seminoles had always been friends and neighbors and spoke the same language.

In this way the Seminoles became occupants of a part of the Creek country, and on the 7th of August, 1856, a treaty was entered into between the United States and the Creeks and Seminoles for the purpose, as will be seen by the preamble (11 Stats., 699), of settling dissensions and controversies that had arisen between the Creeks and Seminoles by reason of the location of the latter in the Creek country. The third article of said treaty provides:

"The United States do hereby solemnly guarantee to the Seminoles the tract of country ceded to them by the first article of this convention, and to the Creek Indians the

lands included within the boundaries defined in the second article thereof, and likewise that the same shall be respectively secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek nation by the fourteenth article of the treaty of March 24, 1832, the third of the treaty of February 14, 1833, and by the letters patent issued to the Creek nation on the 11th of August, 1852, recorded, &c. * * * *Provided, however*, That no part of the tract of country so ceded to the Seminoles shall ever be sold or otherwise disposed of without the consent of both parties legally given."

As in the case of the Choctaws, the United States also solemnly agree and bind themselves that no State or Territory shall ever pass laws for the government of these tribes, and that no portion of the territory ceded shall ever be embraced within the limits of any State or Territory without the full and free consent of the Indians.

The substance of these four treaties may be briefly stated as follows: The Creeks ceded their lands in Georgia and Alabama to the United States and took in exchange the lands between the Canadian fork and the Arkansas river. The Seminoles did likewise with their lands in Florida and were located upon the lands of the Creeks west of the Mississippi. The Creeks and Seminoles removed to this country, and a separate tract was set apart for the Seminoles, to which they afterwards obtained the fee-simple title under the said treaty of August 7, 1856.

These Indians having thus acquired the title to these lands, and the United States having, as aforesaid, adopted the scheme (as it has been called in some of the official communications above referred to) of colonizing other bands of Indians on the western part of the Indian Territory, a commission was appointed, as above stated, in connection with the Choctaw and Chickasaw cession, to meet and treat with the Indians assembled in council at Fort Smith in the month of September, 1865, upon the basis of the seven propositions already set forth herein.

The Seminoles and Creeks were also represented in this council, and, as a matter of course, the said seven propositions were submitted to their delegates as well as to the others there assembled. The speech that was made by Commissioner of Indian Affairs Cooley was addressed to and considered by these delegates of the Creeks and Seminoles, and these seven propositions, in whatever form they were made, were carried home by these delegates of the last-named tribes for the consideration of their respective nations.

The result of this was that on the 11th of March, 1866, a treaty was concluded between the United States and the Seminoles (14 Stats., 755), by the first article of which it was declared that perpetual peace should exist between the contracting parties; that the Seminoles would remain firm allies of the United States, and that they would remain at peace with the other Indian tribes and among themselves, which is substantially the same as the provisions made in the first article of the treaty of the 28th of April of the same year with the Choctaws and Chickasaws.

By article 2 of said treaty with the Seminoles it was stipulated that slavery should be abolished, as was also done by the second article of the said treaty with the Choctaws and Chickasaws. By article 3 of the said Seminole treaty it is stipulated that—

"In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminoles with the Creek nation under the provisions of article 1 of the treaty of the United States with the Creeks and Seminoles made and executed at Washington August 7, 1856."

In consideration of said cession of lands, estimated at 2,169,080 acres, the United States agreed to pay the Seminoles the sum of $325,362, being at the rate of 15 cents an acre.

Now, it should be distinctly borne in mind that by the

treaties to which reference has just been made the Semi
acquired a fee-simple title to the tract of land set ap
them by the treaty of 1856, to be held by them, as i
present case, so long as they should exist as a natio
continue to reside thereon. By the treaty of 1866 the
noles as absolutely ceded these lands to the United
as did the claimants in this case, and received as a consi
tion therefor the sum of 15 cents an acre.

Subsequently the United States, for reasons not nece
here to be stated, as they are a part of the history o
country, proposed to open these lands for settlement, th
diverting them from the purpose for which they were
inally set apart, and thereupon the question arose
whether or not these Seminole Indians had any
therein; and, if so, what (see Ex. Doc. 122, 50th Con
sess.), and the Congress of the United States, after the f
investigation possible, by the act of the 2d of March,
(25 Stats., 1004), appropriated the sum of $1,912,942
pay the Seminoles for their reversionary or equitable in
in said lands.

Keeping now in mind this antecedent history to
we have just above referred, and which it is not nece
to repeat, we will next direct the attention of the co
the treaty that was made on the 14th of June, 186
Stats., 785), with the Creeks, by the first article of whi
in the other treaties mentioned, provision was mad
perpetual peace, in the second the abolishment of sl
and in the third a cession as follows:

"In compliance with the desire of the United Stat
locate other Indians and freedmen thereon, the C
hereby cede and convey to the United States, to be s
and used as homes for such other civilized Indians
United States may desire to settle thereon, the west h
their entire domain, to be divided by a line running
and south, * * * and in consideration of said cess
the west half of their lands, estimated to contain 3,25
acres, the United States agree to pay the sum of thirty
per acre, amounting to $975,168, &c."

The only difference, if it is a difference, between the language employed in this cession and that used in the treaty with the Choctaws and Chickasaws is that it contains the words "to be sold to and used as homes for such other civilized Indians," &c. This is really no difference whatever, because the objects that were sought to be accomplished by all of the said several treaties with the Creeks, Seminoles, Choctaws, and Chickasaws, the provisions of which we have above set forth, were precisely the same and a part of the same general plan or scheme, to wit, the establishment of peace, the abolishment of slavery, and the procuring of the right to locate other Indians on the lands belonging to the nations treated with that were still unoccupied, &c.; and it will be noticed that the Creeks ceded this land to the United States for the specified sum of thirty cents an acre.

Such being the condition of affairs upon and after the execution of the treaty with the Creeks of June 14, 1866, when the United States entered upon the new scheme of opening the unoccupied lands in the Indian Territory to public settlement, which has been before referred to (see Ex. Doc. 98, 50th Cong., 2d sess.), the question arose as to whether the Creeks had any interest in the lands so ceded by them by the treaty of 1866, and the Government of the United States contemplating, as aforesaid, the opening of these lands to settlement, and the establishment of a territorial form of government thereover (which, it will be remembered, was prohibited by the treaties above named), and after having acquired all the information from the executive and judicial departments of the Government which has already been brought to the attention of the court, on the 1st of March, 1889 (25 Stats., 759), an appropriation was made by Congress, as in the case of the Seminoles, to pay the Creeks $2,280,857.10 for their equitable interest in these lands, this payment being at the rate of $1.25 per acre, deducting the 30 cents per acre paid in accordance with the treaty of June 14, 1866, as to unassigned lands, and 20 cents

per acre to cover expenses on the lands theretofore assigned to and occupied by other Indians.

THE CHEROKEES.

The Cherokees also owned lands east of the Mississippi, and the Government, for the same reasons that have been mentioned as to the Indians above named, desired to effect their removal to the west. The Government pursued the same policy with relation to the Cherokees, granting them territory for their sole occupancy west of the Mississippi, and giving them the same guarantees against intrusion and against their ever being subject to any government other than their own as in the cases to which attention has already been called.

These last-named Indians received the same grant in fee-simple, and when the United States desired to locate other Indians on their lands they were invited to participate and did participate in the convention of 1865 just as the others did. They made a treaty with the United States in 1866 of the same tenor and on the same basis as the other treaties making provision for the settlement of other Indian tribes on the lands of the other nations with whom treaties were made in the same year, and when such settlements were made the Cherokees were paid the full value of the land so settled.

So that in every case the Indians, in the carrying out of this policy, have been paid for the lands secured to them, when they have been diverted from the purposes for which they were set apart, and if, in this case, these claimants are not paid for their said equitable interest they will be made the sole exception, although the conditions and circumstances under which they made the cession of 1866 are identically the same.

In this connection, as a further instance of the construction placed by Congress upon the language making the

cessions contained in the said various treaties of 1866, to which we have referred, we again ask the attention of the court to what we have already said in connection with the appropriation made in favor of the Choctaws and Chickasaws of the 3d of March, 1891 (26 *Stats.*, 1005), to pay them for their equitable interest in the part of this same leased district upon which the Cheyennes and Arapahoes had been located. (*See claimant's petition, pp.* 20, 21.)

VIII.

POWER OF THE COURT TO REFORM THE CESSION OF 1866

In the brief of the attorney for the Government it is claimed that "the court below had no jurisdiction to go "beyond the plain words of the cession in the treaty of "1866 and to inquire into any supposed intention of the "parties to create a trust instead of making it an absolute "cession"—in other words, that the court below was without jurisdiction to reform or construe the treaty of 1866 so as to make the cession in article 3 to be a cession in trust.

In support of this contention the attorney for the Government asserts (*a*) that the language of the treaty is not doubtful or inconsistent; (*b*) that the jurisdictional act confers no power of reformation upon the court, and that (*c*) the act is not ineffective, although no power of reformation is given.

Referring to the act giving this court jurisdiction of the case at bar, it will be observed that it expressly states that it is the intention to allow the court "jurisdiction, so that the rights, legal and *equitable*," of the various parties "in the premises shall be fully considered and determined." As I have before said, it is manifest that it was the intention of Congress to bestow upon the court jurisdiction to determine this whole matter in all its legal and equitable aspects.

One of the most conspicuous and useful of the powers of

courts of equity is the power to reform instruments in writing that do not express the actual meaning and intent of the parties and to decree relief according to the terms of the instrument as it would have read if the intent of the parties had been correctly expressed. This is a rule of equity jurisprudence so familiar that a citation of authorities is unnecessary. Nevertheless, I ask the attention of the court to the following, which I quote from the leading case of *Gillespie vs. Moon* (2 Johnson's Ch'y, N. Y., 596):

"The rule in the courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. *But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself.* 'It must be an essential ingredient,' says Lord Thurlow (1 Bro., 350), 'to any relief under this head that it should be an accident perfectly distinct from the sense of the instrument.' I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, *that relief can be had against any deed or contract in writing founded in mistake or fraud. The mistake may be shown by parol proof,* and the relief granted to the injured party whether he sets up the mistake affirmatively, by bill, or as a defense."

The chancellor then proceeds with an elaborate and detailed examination of the cases upon this subject, English and American, from which he reaches the conclusion above quoted. This case has been cited with approval in innumerable cases since the said decision was rendered, with which it is not necessary to encumber this brief.

Recurring briefly to what has already been gone over herein, it is beyond all dispute that the Choctaws held title, unincumbered by the occupancy of any other tribes or bands of Indians, to a vast tract of territory east of the Mississippi river; that their occupancy had been intruded upon by the

whites, and that efforts had been made to subject them to the laws of Mississippi; that they resisted these intrusions and these efforts to subject them to a jurisdiction other than their own, and that they were therefore willing to comply with the desire of the said State and of the United States that they should remove to the lands now occupied by them west of the Mississippi. One of the most important of the considerations that moved them to cede their lands in Mississippi to the United States was their desire to preserve their own autonomy as a nation, and to have a tract of country over which they would have exclusive control and jurisdiction free from all interruption and intrusion by any people other than their own.

This consideration to these Indians was of supreme importance, and upon the right to the exclusive occupancy of their lands and to govern themselves they naturally placed the highest value. It was obviously their desire to obtain the full and uninterrupted enjoyment of these rights and privileges that induced them to relinquish to the United States this vast tract of country in which they had lived, and over which they had had the supreme control, for an unknown number of years before it was first inhabited by the whites. Nothing but a consideration in the highest degree vital to their existence and happiness could have induced them to remove from the land of which they had for so many years enjoyed complete possession and exclusive occupancy, and on which it is conceded they had the right to remain, where they had had health, prosperity, and independence, and to which they were attached by all the ties of what are known as love of country and love of home.

All these things the Choctaws gave up at the instance of the Government of the United States and went into a land unknown to them under the solemn promise and assurance that they should be protected from further persecution and intrusion, and that they should have conferred upon them the absolute ownership and title thereto; that they should

have the right to the sole occupancy of it, and that no governmental control other than their own should ever be exercised thereover. With the utmost care these Indians made these provisions against the ills to which they had been subjected because of the fact that they were within the jurisdiction of a State that was continually enacting laws hostile and oppressive to them.

These wrongs and oppressions are matters of history with which this court is already familiar, they having been brought to its attention in the case, recently decided, of the *Choctaw Nation vs. The United States*, known as "the net proceeds case," reported in 119 U. S., p. 1 *et seq.*

The stipulation for the protection and independence of these Indians is one of the most conspicuous features in all the compacts and treaties that they entered into with the United States in regard to their lands, and is a right which they had always jealously and carefully guarded and provided for. It is provided for in article 7 of the said treaty of June 22, 1855, where it is said that "so far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secure in the unrestricted right of self-government, and have jurisdiction over all persons and property within their respective limits," and substantially the same provision is contained in the treaty of April 28, 1866, which contains the cession of the lands now in dispute.

This being so, as has been hereinbefore more fully set forth, when the United States, in 1865, desired to procure the privilege of locating other bands or tribes of Indians in the western portion of the Indian Territory, this policy and obligation to protect the Choctaws and Chickasaws against intrusion, except with their consent, was recognized, and when the delegates of the several nations were brought together at Fort Smith, the commissioners appointed by the United States presented the said fifth proposition to said

delegates, which was in substance, no matter in what form it was expressed, that "a part of the Indian country be set apart to be purchased for the use of such Indians from Kansas or elsewhere as the Government may desire to colonize therein." They were made to understand, as stated in the speech of Mr. Cooley, that—

"A portion of the lands now occupied by you *must be set apart for the friendly tribes, now in Kansas and elsewhere, on such terms as may be agreed upon by the parties and approved by the Government*, or such as may be fixed by the Government."

It was upon this basis that the treaty with the Choctaws and Chickasaws of 1866 was negotiated, and it was upon the mutual understanding that it was for said purpose that the lands in controversy were ceded to the United States, and that said treaty was executed by the Indians and approved and administered by the Government of the United States. The Choctaws and Chickasaws so understood it, as is conclusively shown by the evidence (see the deposition of Gen. Cyrus Bussey on file herein), by the terms of the unsigned treaty of 1865, and by the surrounding circumstances, and it was so understood by the officials of the Government who were called upon to administer it, as is apparent from their subsequent interpretation of it, and their statements to the delegates of the purposes for which the said convention or council was called together.

Such being the case, if by any accident, inadvertence, or design (and we do not attribute it to design), or if by a careless use of language, the words used in the said treaty of April 28, 1866, do not express this most manifest intention of the parties because of the omission to insert provisions reserving and securing to the claimants in this case the interest, trust, and equity hereinabove set forth, as promised and stipulated by the commissioners who negotiated the said treaty, then it is not only within the power

of this court, but is its manifest duty, to reform this instrument so as to make it express this clearly understood intention, or, which is the same thing, to interpret it according to such manifest intention and render a judgment accordingly.

So reformed or interpreted, the result would be that the opening of these lands to the public for settlement under the land laws of the United States would terminate this trust, would violate the solemn obligation of the United States to preserve these lands to the use of the claimants alone, and would obliterate any consent by the Choctaws and Chickasaws to place other Indians thereon, and would render the United States, according to all the rules of law and equity applicable to the questions involved, liable to the Choctaw and Chickasaw nations for the full value of said lands divested of the trust, and which value is legislatively fixed at $1.25 per acre.

And there is another principle of equity that is here applicable. The Indians are the wards of the nation. Whenever the question has been before this court, they have been held to be under the tutelage and protection of the United States. As was said in the case of *United States vs. Kagama* (118 U. S., 383), "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, there arises the duty of protection, and with it the power." This being so, under all the principles that have been asserted by this court in regard to the interpretation of treaties with these Indian nations, the transaction in the present case should be as carefully scrutinized and as strictly construed against the United States as any transaction of like character between guardian and ward.

It is a fundamental rule in such transactions that purchases by the guardian from the ward will be set aside, if the interests of the ward have been sacrificed, as constructively fraudulent. Can a transaction between the United

States and these Indians, by which the United States acquires from them their territory east of the Mississippi, of incalculable value, and then obtains a cession of more than 7,700,000 acres of the land which they had given in exchange for less than four cents an acre, bear the test of such scrutiny? Surely the right of the court to construe this instrument upon this ground, if not upon the ground of the mistake heretofore shown, cannot be doubted.

IX.

CONSIDERATION FOR CESSION AND LEASE IN TREATY OF 1855.

The attorney for the Government devotes nearly one hundred pages of his brief (pages 45 to 141) to an attempt to show that the $800,000 paid under the treaty of 1855 for the relinquishment and lease therein set forth, and the $300,000 paid under the treaty of 1866, were paid for the absolute cession to the United States of the leased district; that this $1,100,000 was a sufficient consideration, and that the Choctaws and Chickasaws have therefore parted with all their interest in said lands; and in support of said contention he asserts—

(*a.*) That the United States had no power to convey the land west of the 100th degree of west longitude, relinquished by the treaty of 1855 to the Choctaws;

(*b.*) That the treaty of 1830, limiting the cession to the 100th meridian, annulled the treaty of 1820;

(*c.*) That the provision for said relinquishment was only inserted in the treaty of 1855 as a correction of an error made by the United States in apparently conveying said land to the Choctaws in the treaty of 1820;

(*d.*) That the lease of 1855 being a lease for the *permanent* settlement of other Indians on the property leased, the lessors were divested of any reversionary interest therein; and,

(*e.*) That the whole of the $800,000 provided for in the

treaty of 1855 should therefore be applied as consideration for the *lease* therein made and not the relinquishment.

Aside from the fact that even if this contention of the attorney for the Government were sound, such a consideration (about 14 cents an acre) would be so grossly inadequate that the cession of 1866, under the circumstances under which it was made, would be set aside for that reason alone. I think it will be apparent to the court from the following that the $800,000 provided for in the treaty of 1855 was paid at least in part for the relinquishment in question.

1. Answering the first of the above contentions of the attorney for the Government, I shall first call attention to article 2 of the treaty of 1820 (7 Stats., 210), in which it is recited that—

"For and in consideration of the foregoing cession" (of more than 6,000,000 acres east of the Mississippi) "on the part of the Choctaw nation, and in part satisfaction for the same, the commissioners of the United States, in behalf of said States, do hereby cede to said nation a tract of country west of the Mississippi river, situate between the Arkansas and Red rivers, and bounded as follows: Beginning on the Arkansas river where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due south to the Red river; thence down Red river three miles below the mouth of Little river, which empties itself into Red river on the north side; thence a direct line to the beginning."

In the treaty of 1830, already fully set out, in consideration of the relinquishment by the Choctaws of the remainder of their land east of the Mississippi, about 10,000,000 acres, the United States stipulated that—

"Under a grant specially to be made by the President of the United States, (the United States) shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it: Beginning near Fort Smith, where the Ar-

kansas boundary crosses the Arkansas river; running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river, and down Red river to the west boundary of the Territory of Arkansas; thence north along that line to the beginning."

It will thus be seen that when in 1830, for the reasons already given, it became necessary again to treat with the Choctaws for their removal west of the Mississippi, it will be noticed that an attempt was made to secure to them the same amount of territory west as they had received under the treaty of 1820—that is, the cession was to the source of the Canadian fork and thence due south to the Red river, as in the treaty of 1820; but as the United States had then ceded the land west of the 100th meridian to Spain, the extent of the cession west was to the source of the Canadian "if in the limits of the United States, or to those limits."

The land included in the above cession was part of the territory acquired from France in 1803. It is true, as stated in the brief of the Government, that by the treaty proclaimed on the 22d of February, 1821, the land embraced in the cession to the Choctaws in 1820 west of the 100th meridian was ceded to Spain; but it is equally true that as between the United States and the Choctaws this cession to Spain can cut no figure. The sovereignty of the land was ceded to Spain, but this cession was, of course, subject to the rights of property of the inhabitants thereof, and when it was restored to the United States by Mexico it was still subject to these rights.

A great part of the argument of the attorney for the Government is based upon the assumption that the power of the United States to convey the territory ceded to the Choctaws under the treaty of 1820 was restricted to the right to convey the territory it had acquired from the Quapaws under the treaty with those Indians of August 24, 1818 (7 Stats., 176). As will be shown hereafter in what I shall

have to say regarding the claim of the Wichitas and affiliated bands, it was within the power of the United States to convey to the Choctaws the fee of the lands within the boundaries described in the treaty of 1820 irrespective of any rights they had acquired from the Quapaws (*Beecher vs. Wetherby*, 95 U. S., 517) or any other Indians, and as the attorney for the Government himself asserts that the Quapaws had no title to and did not cede to the United States any lands *west* of the 100th meridian (see his brief, p. 50 *et seq.*), it is difficult to see how any limitation in the cession of the Quapaws to the United States can control the right of the United States to cede to the Choctaws lands in which the Quapaws had no interest.

2. As indicated above, the attorney for the United States also contends that as the treaty of 1830 excludes the country west of the 100th meridian (in that the extent of the grant is only to the limits of the United States, which were then at that point), the treaty of 1820 is annulled and the cession in the latter treaty must control. In making this contention the attorney for the Government indiscreetly makes use of a sword that cuts both ways. If the treaty of 1820 is annulled, it follows that the cession of the land east of the Mississippi becomes inoperative, and that the 6,000,000 acres therein ceded still belong to the Choctaws.

As in the case of a statute, the rules for the construction of which apply equally to treaties, as has been shown, a subsequent treaty cannot be said to repeal or annul a former one so as to divest a nation or individuals of rights of property that have been acquired thereunder unless that intention clearly appears, and then adequate compensation must be provided. The rule is stated in 23 American and English Encyclopædia of Law (p. 503) as follows:

"The repeal of a statute, in the absence of a saving clause, necessarily divests and destroys all inchoate interests which have arisen under it, *but leaves unimpaired those that have become vested.*" Citing many cases in note 1.

Aside from the fact that the treaty of 1830 was evidently intended as a *confirmation* of the cession contained in the treaty of 1820, repeating, as it does, the extent of the cession west in exactly the same words, it will be seen from the above that even if it had in terms repealed the treaty of 1820, to which it was merely an addition, it could not affect the vested rights of property acquired by the Choctaws under the treaty of 1820 before this land was ceded to Spain and when the United States were the undisputed owners thereof.

But this question is settled beyond dispute by the recognition of and payment for the land ceded in the treaty of 1820 that is contained in the treaty of 1855.

3. It is also asserted by the attorney for the Government that this cession of land beyond the 100th meridian is impossible, because a line drawn due south from the source of the Canadian river would not strike the Red river, as called for in the description in the treaty of 1820, the source of the Red river being further east.

In reply to this it is only necessary to mention that elementary rule in the construction of descriptions in deeds that where there is an ambiguity or discrepancy between the metes and bounds and natural or artificial monuments that are also named the latter control; and the reason upon which this rule is based is particularly applicable in this case, for what did the Indians know about "meridians" and lines drawn "due south"? Nothing, of course. What they did know was that by this treaty of 1820 they were getting a section of land lying between the Canadian and Red rivers and extending west to their sources, and it is respectfully submitted that this description must be construed accordingly.

4. From all of the above it follows that at the time of the making of the treaty of 1855 the United States must have

regarded the Choctaws as the owners of the part of the ce
sion of 1820 lying west of the 100th meridian, and that th
provision for the relinquishment was not inserted mere
for the purpose of correcting an error in the treaty of 182
It is clear that the United States had the right and power
and actually did convey to the Choctaws the land west
the 100th degree, and that it was for the relinquishment
their title thereto that at least a part of the $800,000 consi
eration was paid.

The attorney for the Government argues that, as und
the agreement between the Choctaws and Chickasaws th
proportion in which they were to own their lands was
three-fourths to one-fourth, the appropriation in the trea
of 1855 of $200,000 to the Chickasaws and $600,000 to th
Choctaws shows that it was the intention of the Governme
that the $800,000 should be paid exclusively for the leas
allowing nothing for the relinquishment. As a matter
fact, $400,000 was paid for the relinquishment of th
Choctaws of their land west of the 100th meridian an
the remaining $400,000 was paid to the Choctaws an
Chickasaws as compensation for the lease of lands betwe
the 98th and 100th degrees.

Counsel for the Government has evidently overlooked th
first article of the agreement of January 17, 1837 (Ap
Rec., p. 20), wherein, in providing for the status of th
Chickasaws, it states the Chickasaws are "to have an equ
representation in their (Choctaw) general council, and to
placed on an equal footing, in every other respect, with an
of the other districts of said nation, except a voice in th
management of the consideration which is given for the
rights and privileges; and the Chickasaw people to be en
tled to all the rights and privileges, with the exception
participating in the Choctaw annuities, and the consider
tion to be paid for these rights and privileges," &c.

In pursuance of this the Chickasaws became entitled

share in the proceeds of these two transactions, and they received $100,000 each of the amounts paid for the relinquishment and the lease. (See letter of Choctaw delegates, App. Rec., p. 303.)

5. Although the attorney for the Government takes the ground that while the conveyance in the treaty of 1855 purports to be a lease, it is not in fact a lease, and contains none of the elements of a lease; that as the Government is given the right to *permanently* locate Indians upon the lands in the leased district, the Choctaws and Chickasaws have no reversionary interest in such lands as have actually been so settled, still he takes occasion, on page 267 of his brief, to cite a case that completely and effectually disposes of this most important theory in his case.

The case to which he refers is the case of the *Texas and Pacific Railway Company vs. Marshall* (136 U. S., 393), where the railroad company, in consideration of $300,000 and 66 acres of land, agreed to *permanently* establish its eastern terminus and Texas office in the city of Marshall and to construct in said city machine shops and car works. What is quoted from said case by the attorney for the Government is as follows:

"It seems to us that the real essence of the contract was that the railroad company should, in its process of construction, make this city its eastern terminus and should establish there its depot, its machine shops, and its car works, and that this should be done in the ordinary course of its business, with the purpose that it should be *permanent;* but it did not amount to a covenant that the company should never cease to make its eastern terminus at Marshall; that it would for all time continue to have its machine shops and car works there, and that whatever might be the changes of time and circumstances, of railroad rivalry and assistance, these things alone should remain forever unchangeable. * * *

"It appears to us, so far from this, that the contract on the part of the railroad company is satisfied and performed

when it establishes and keeps a depot and sets in operation car works and machine shops, and keeps them going for eight years and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place. It was the fair meaning of the words 'permanent establishment' as there was no intention at the time of removing or abandoning them. *The word 'permanent' does not mean forever, or lasting forever, or existing forever.* The language used is to be considered according to its nature and its relation to the subject-matter of the contract, and we think that these things were permanently established by the railway company at Marshall."

The attorney for the Government also cites:

Mead vs. Ballard, 7 Wall., 290.
Newton vs. Commissioners, 100 U. S., 548.
Sumner vs. Darnell, 128 Ind., 38.
Hardy vs. Wiley, 87 Va., 125.

It would seem unnecessary to comment upon the effect of this decision upon the theory of the Government. If by the use of the word "permanently" the Choctaws and Chickasaws did not grant to the United States the right to locate other Indians upon the leased district *forever*, but only so long as they might continue to exercise the right, it follows that upon the abandonment of that purpose the land reverts to the grantors.

X.

THE CLAIM OF THE WICHITAS.

As before stated, the claim of the Wichitas and affiliated bands is based upon (*a*) their alleged aboriginal occupancy of the land involved in this controversy; (*b*) the treaty of August 24, 1835, between the United States and the Wichita, Comanche, Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw Indians; (*c*) the provision in article 9 of the

treaty of 1855 for their "permanent" settlement on said lands, and (*d*) an unratified agreement made in 1872.

ABORIGINAL OCCUPANCY.

To the first of these contentions of the Wichitas, to wit, that the cessions of the United States to the Choctaws in 1820 and 1830 were ineffective because the Wichitas had a prior and better title to these lands than the United States, there are many replies:

1. One alone is conclusive. It is that the United States have the supreme and paramount title to any and all of the public domain, and can confer upon any grantee a good title, whether aboriginal title of the Indian occupants is extinguished or not. It is true that by a conveyance of such lands the naked fee only is passed to the grantee, and that the grantee takes subject to the Indian right of occupancy; but, as between the Choctaws and Chickasaws and the United States, this can make no difference, as it is to the United States that the aboriginal claimants must look for compensation for the loss of their lands.

This question has been passed upon by the Supreme Court of the United States in many cases, among others, in the case of *Beecher vs. Wetherby* (95 U. S., 517). On page 525 *et seq.* the court lays down the doctrine that we have just stated. This case of *Beecher vs. Wetherby* was one in which the Menomonee Indians claimed the aboriginal title to the lands involved in the suit as one that had not been extinguished, and the court was thus brought to the exact question with which we are now dealing. In the opinion of the court, at said page 525, delivered by Justice Field, it is said:

"But the right which the Indians held was *only that of occupancy. The fee was in the United States*, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked

fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that, in this matter, the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, *the propriety or justice of their actions towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties*, neither of whom derives title from the Indians. *The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the Government.* It was so ruled in *Johnson vs. McIntosh* (8 Wheat., 543), in 1823, and in *United States vs. Cook* (19 Wall., 591), in 1873. Other cases between those periods have affirmed the same doctrine. *Clark vs. Smith* (13 Pet., 195). See, also, *Jackson vs. Hudson* (3 Johns. N. Y., 375); *Veeder vs. Guppy* (3 Wis., 502), and 8 Op. Att'y Gen'l, pp. 262–'4. In *United States vs. Cook*, the United States maintained replevin for timber cut and sold by Indians on lands reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson vs. McIntosh* on this point had never been doubted. * * * 'The possession, when abandoned by the Indians, attaches itself to the fee without further grant.'"

2. Neither in the treaty of 1820 nor in that of 1830 is there any recognition whatever of the fact that the lands ceded thereunder to the Choctaws were occupied by the Wichitas or any other bands of Indians, nor is there any reservation whatever in favor of any such Indian occupants; on the contrary, the treaty of 1830 provides "that the United "States, under a grant specially to be made by the President "of the United States, shall cause to be conveyed to the "Choctaw nation a tract of country west of the Mississippi "river in fee simple to them and their descendants, to inure "to them while they shall exist as a nation, and live on it," and in article 4 it is provided that—

"The Government and people of the United States *are hereby obliged* to secure to the Choctaw nation of red people *the jurisdiction and government of all the persons and property that may be within their limits*, so that no Territory or State shall ever have a right to pass laws for their government, *and no part of the land granted them shall ever be embraced in any Territory or State.*"

3. The fact that the Government of the United States did not regard the Wichitas or any other Indians as having any rights in or title to the said lands by reason of their prior occupancy is conclusively shown by the ninth article of the said treaty of 1855, which provides for the settlement of the said Indians in this leased district. Such a provision would have been wholly unnecessary if the occupation of that country by the Wichitas prior to said treaty was such as to fix on it their alleged aboriginal title or rights.

4. In addition to this, Congress has, throughout its entire dealings with the Wichitas, dealt with them, and with the subject of their territorial rights, on the principle and assumption that they were inhabitants or occupants of lands in the State of Texas and not of this Choctaw country. After the promulgation of the said treaty of 1855, a series of legislative acts was passed which show upon their face that the Wichitas were not inhabitants of the Choctaw leased district, but were inhabitants of Texas, and that they were required, in order to become occupants of the leased district, to be colonized thither by the United States. The following acts, among others, may be pointed to as showing this:

The appropriation act of June 19, 1860 (12 Stats., 56), expressly provides for the removal of "the Indians (naming, among others, the Wichitas) lately residing in Texas to the country leased from the Choctaws"—this, in so many words. The separate government and autonomy of the Wichitas, and the fact that they were located in Texas

in a territory entirely separate and distinct from the territory ceded to the Choctaws, and therefore were not possessed in their aboriginal right of this Choctaw country, are also recognized in the following acts:

The act of March 2, 1861 (12 Stats., 236); that of June 25, 1864 (13 Stats., 177); that of March 3, 1865 (13 Stats., 551); that of July 26, 1866 (14 Stats., 278); that of March 2, 1867 (14 Stats., 514), and that of July 27, 1868 (15 Stats., 20).

And in the following acts appropriation is made for the subsistence and transportation, among others, of the Wichitas, "collected upon the reservation set apart for their use and occupation in the Choctaw country:" The acts of May 28, 1872 (17 Stats., 284); March 3, 1871 (16 Stats., 564); February 14, 1873 (17 Stats., 440); June 22, 1874 (18 Stats., 149); March 3, 1875 (18 Stats., 423); March 3, 1877 (19 Stats., 290); May 27, 1878 (20 Stats., 84), and many other equivalent acts, the benefits of the provisions of which the Wichitas have voluntarily accepted.

The undeniable effect of this unbroken chain of legislation is the establishment, beyond all cavil, of the proposition that the aboriginal rights of the Wichitas in this leased district did not exist at the date of the said treaty of June 22, 1855, and whether they have acquired any rights since then by treaty stipulation or by express agreement with the United States is a question which will be considered in another connection in this brief.

5. Still further evidence of the fact that the Wichitas could not have been the occupants of this land at the time of the Choctaw cession of 1820 is furnished by the treaty of August 24, 1818 (7 Stats., 176), by which the United States obtained from the *Quapaws*, and not the Wichitas, the identical section of country in which the leased district is situate, and in which there is no mention made of Wichita occupancy.

The above, I think, completely disposes of the claim of the Wichitas and affiliated bands to the proceeds of the sale of these lands because of any right or title they have therein by reason of their aboriginal occupancy.

THE TREATY OF 1835.

The claim of the Wichitas is also based upon the treaty of August 24, 1835 (7 Stats., 474), the preamble of which states that it was entered into "for the purpose of establishing perpetual peace and friendship between the United States and the Comanche and Wichita nations and their associated bands or tribes, and between these nations or tribes and the Cherokee, Muscogee, Choctaw, Osage, Seneca, and Quapaw nations or tribes of Indians."

This is the first we hear of the Wichitas in the way of any business, peace, or other negotiations with the United States, and it is claimed that by this treaty of 1835 the United States recognized the dominion of the Wichitas over the land in question by reason of their aboriginal occupancy thereof. This, of course, we deny. The various provisions of the treaty and the purposes for which it was entered into are sufficiently indicated by the following extracts therefrom:

Article 1 provides:

"There shall be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the Comanche and Wichita nations, and their associated bands or tribes, and the Cherokees," &c.

Article 2 provides:

"Every injury or act of hostility by one or either of the contracting parties shall be mutually forgiven and forever forgot," &c.

Article 3 provides:

"There shall be a free and friendly intercourse between all the contracting parties hereto, and it is distinctly understood and agreed by the Comanche and Wichita nations, and their associated bands or tribes of Indians, that the citizens of the United States are freely permitted to pass and repass through their settlements or hunting grounds without molestation or injury on their way to any of the provinces of the Republic of Mexico," &c.

Article 4 provides:

"It is understood and agreed by all the nations or tribes of Indians, parties to this treaty, that each and all of the said nations or tribes have free permission to hunt and trap in the great prairie west of the Cross Timbers to the western limits of the United States."

Article 5 provides:

"The Comanche and Wichita nations, and their associated tribes or bands of Indians, severally agree and bind themselves to pay full value for any injury their people may do to the goods or other property of such traders as the President of the United States may place near to their settlements or hunting ground for the purpose of trading with them."

Article 6 provides:

"The Comanche and Wichita nations, and their associated bands or tribes of Indians, agree that in the event of any of the red people belonging to the nations or tribes residing south of the Missouri river and west of the State of Missouri, not parties to this treaty, should visit their own towns or be found in their hunting grounds they will treat them with kindness and friendship and do no injury to them in any way whatever."

Now, if the contention of the Wichitas in respect of this treaty be correct, it just as much establishes a right of occupancy in the Comanche, Osage, Seneca, Quapaw, Muscogee, and Cherokee Indians as in them. That all of these Indians

had the exclusive right of occupancy of this land is simply preposterous, and the fact that they were all mentioned in the treaty only confirms our theory that these Wichitas, in common with many other tribes or bands, may have roamed over and hunted in these lands, but negatives the idea that they had any such inherent rights therein, by reason of their alleged occupancy, as would entitle them to compensation upon the sale thereof by the United States. As before stated, if they had they would have asserted their claim long ago, when they were placed there by the United States under the lease made by the treaty of 1855.

The treaty of 1835, with the Comanches, Wichitas, and others, contains no recognition of a right of occupancy in the Wichitas or in any of the nations named, but, on the contrary, as we have above said, makes such a contention impossible. It was not intended for any such purpose, and no inference of that kind can possibly be drawn from it. All that can be deduced from its various provisions is that there were a number of bands or tribes of Indians located in various parts of the country that were hostile to each other and to the whites; when they came in contact on these lands, which they were in the habit of using as a hunting ground, conflicts and strife arose, which it was the desire of the Government to prevent and suppress, and it is perfectly apparent that the whole purpose of this treaty was to restore peace and good order among the various Indian tribes or bands who were using this land as hunting ground.

These various tribes and bands of Indians resided elsewhere, roaming over these lands and using them as a common hunting ground, and the presence of the Choctaws in said treaty was not for the purpose of recognizing the right of occupancy in any of the other bands or tribes, but was for the purpose of accomplishing what the treaty in its preamble says that it was made to accomplish, to wit, the preservation of peace. The Choctaws, being also named therein, could as well claim the said treaty to be a recogni-

tion of their rights by reason of occupancy as could the Wichitas or any of the other Indians named.

And this view is made absolutely conclusive by the provisions of article 4 of the treaty with the Choctaws of 1830, which have already been quoted in this brief. It will be remembered that it provides that the United States shall secure to the Choctaw nation "the jurisdiction and govern-"ment of all the persons and property that may be within "their limits," making no exception in favor of the Wichitas or any other Indians. It is specific in providing that *the Choctaws alone* shall govern and have jurisdiction of all persons and property within their limits. This, of course, would have included the Wichitas if they had been occupants of that country; and it seems absurd, therefore, to contend that it was the intention of the treaty of 1835 to leave them and their associated bands and tribes in full possession and enjoyment of their alleged aboriginal rights when it had already been ordained that the *Choctaws alone* should have the absolute right to the jurisdiction and government of persons and property upon said land.

A more dangerous state of things than this contention of the Wichitas alleges to have existed could not be devised. It is not to be supposed that if the Wichitas and affiliated bands of Indians really were the recognized aboriginal occupants of this land, as alleged, they would have stood by, without protest and without effort to prevent such an intrusion upon their rights, and submitted their lands and themselves to the jurisdiction, government, and ownership of the Choctaws. Such a condition of affairs would inevitably have insured between these grantees of the United States and the various tribes settled in the same territory, each of which had, according to the contention of the Wichitas, the absolute right and power of government over the same land, persons, and property, the one as the grantee of the Government, and the others as the aboriginal occupants of the soil, perpetual war and strife instead of

the peace which it was the very purpose of the Government to establish and maintain.

In 1837 this treaty of 1835 was the subject of construction, and instructions to Chouteau, a special Indian agent, were issued, in which is the following:

"It has been further stated that the Comanches are dissatisfied because the Creeks and the *Choctaws* have extended their occupation and improvements to the country heretofore used by themselves as hunting grounds. This matter should be explained to them, so that they may understand that the United States, having purchased these lands from the tribes possessing the occupant title, has guaranteed the exclusive right in it to the *emigrant Indians*. They cannot, therefore, be permitted to hunt upon it after the latter are prepared to settle upon and cultivate it" (Appendix Record, p. 28).

CLAIM OF THE WICHITAS UNDER THE TREATY OF 1855.

The claim of the Wichitas and affiliated bands is also based upon the theory that as they were settled by the United States in the leased district under and by virtue of the provisions of article 9 of the treaty of 1855, and that as by this article provision was expressly made for a "permanent" settlement, the Choctaws and Chickasaws, having assented to such permanent settlement, are precluded from setting up any claim to the proceeds of the sale of said land provided for in the act of March 2, 1895. In short, it is claimed that it is the possessory right of the Wichitas and affiliated bands and not the equitable interest of the Choctaws and Chickasaws that is being destroyed by said sale, and that consequently the Choctaws and Chickasaws, having released whatever rights they may have had by their consent to the permanent settlement of the Wichitas and affiliated bands, are not entitled to the proceeds of such sale.

1. The assumption upon which this position is based involves an assumption of the entire question in dispute in this case, namely, an assumption that the title bestowed by the Choctaws and Chickasaws upon the United States in the third article of the treaty of the 28th of April, 1866, is not what the act of March 3, 1891 (26 Stats., 1025), declares it to be, to wit, one ceded in trust for the settlement of Indians, but is an absolute cession, putting an end to all right, title, and claim whatsoever of the Choctaws and Chickasaws in and to said land.

In our petition we have shown, we think most abundantly, that the declaration of this act of Congress that these lands were ceded by the claimants "in trust" for the settlement of Indians was accurate—this viewed independently of the force and effect of the act itself—and that, even if it were not a cession "in trust," the said act, as an act of the legislative body having the supreme power of disposing of the public domain, makes it so.

If, then, this was a cession by the Choctaws and Chickasaws to the United States, "in trust" for the settlement of such tribes and bands of Indians as the Government might choose to colonize thereon, as stated in paragraph 5 of our petition (p. 15), the "permanent settlement" mentioned in article 9 of the said treaty of June 22, 1855, could not endure after the land had ceased to be used for that purpose. The right of settlement terminated at the time the land ceased to be so used, and reverted to the claimants in this case and not to the Wichitas and affiliated bands.

If the cession made by article 3 of the said treaty of 1866 was indeed one made to the United States "in trust" to endure only while the United States might choose to use the land for the settlement of other Indians thereon, then it becomes simply self-evident that a *perpetual* occupation by such Indians as the Government might place thereon was not meant. Only such an occupation was intended as would endure so long as the Government had reserved and retained

the power to allow it to be used by such Indians, which power would of course cease as soon as the Government should sell the land or use it for any other purpose.

It is impossible to make this plainer than it is made by a mere statement of the proposition that when a grant is made upon a limitation or condition which, if not performed, works a forfeiture of the thing granted, then the forfeiture or reversion is to the grantor, unless the grantor has authorized it to be in favor of some one else or has released his reversionary interest. In this case there is nothing that makes the reversion to inure to any one else than the Choctaws and Chickasaws. Hence, when the United States ceased to use this land for the settlement thereon of Indians, it reverted to the Choctaws and Chickasaws, and to them alone.

2. In this connection, a further suggestion is appropriate. It is that if the words "permanent occupation" are interpreted to mean an occupation forever, so that if the Wichitas and affiliated bands should ever be deprived thereof they would be entitled to compensation (as they claim), the Government itself would be deprived of all right to put an end to such occupancy, as is done by said act of March 2, 1895, under which this suit is brought, and as is also done by the said act of 1891, opening the part of the leased district occupied by the Cheyennes and Arapahoes to public settlement. Such an interpretation of this language would not only be unreasonable and absurd, but would render it inoperative—inoperative because it would be impossible for the Government to authorize a settlement or occupation of these lands by the Wichitas and affiliated bands that could inure to them after the Government had ceased to use said lands for the settlement thereon of Indians and placed it within the public domain. The Government could not confer upon the Indians settled by it upon this leased district a greater estate than it possessed.

As already stated, the attorney for the United States h
kindly saved me the trouble of citing authorities for t
purpose of showing that the word "permanently" does n
mean forever, and that, therefore, when the Choctaws a
Chickasaws, in article 9 of the treaty of 1855, leased to t
United States the lands between the 98th and 100th meri
ians for the permanent settlement of the Wichitas, &c., th
did not part with their entire interest in said lands (Tex
and Pacific Railway Company *vs.* Marshall, 136 U. S., 39
It is not necessary to repeat those authorities.

THE UNRATIFIED AGREEMENT OF 1872.

The claim of the Wichitas and affiliated bands is al
based upon an agreement that was signed by the Comm
sioner of Indian Affairs on the 19th of October, 1872, und
which they contend that they are entitled to 160 acres apie
and the proceeds of the sale of the unallotted lands in th
alleged reservation.

In reply to this contention it is sufficient to mention t
fact that the agreement referred to was repudiated by t
Indians themselves, was signed by the Commissioner
Indian Affairs without authority, and was never ratified
Congress, although twice submitted for its action.

In arriving at the policy of getting other Indians tha
the five civilized tribes settled in the Indian Territor
which was inaugurated by the treaty of June 22, 1855, wi
the Choctaws and Chickasaws, several ideas entered in
consideration: 1st, That the Choctaws and Chickasaws cou
spare the occupancy of some of their lands between the 98
and 100th degrees of west longitude; 2d, that the Wichi
and other bands or tribes of Indians were troublesome a
their presence very objectionable to the white people
Texas; 3d, that their being neighbors to the five civiliz
tribes would be beneficial and civilizing to the Wichitas a

others; and, 4th, that it would be more convenient and easy for the Government to support and control them.

The Choctaws and Chickasaws did not conceive this arrangement, but consented to it because the immigrants were Indians with tribal organization, with the common Indian ideas and habits as to occupancy of lands, and because the United States made the demand or request (which amounts to the same). The Government of the United States has never conferred with the Choctaws and Chickasaws or any other Indians when it comes to formulating a policy in respect to them or changing its policy. It makes its own policies and expects compliance with them on the part of the Indians. This makes the inequality, dependence, and inferiority of the Indians.

There is no evidence that the United States or the Choctaws and Chickasaws had any thought or intention by the treaty of 1855 of limiting the ultimate fee of the Choctaws and Chickasaws in the lands leased under that treaty.

In 1864 and 1865 the United States again changed its policy, and declared its intention to settle other Indians in this leased district, and demanded compliance with it from the Choctaws and Chickasaws; but in that the Choctaws and Chickasaws came under no obligation to the Wichita and affiliated bands of Indians, nor is there any evidence that the United States demanded or contemplated the creation of a trust in behalf of those Indians.

In 1889, in pursuance of an act of Congress of March 2, 1889 (25 Stat., 1005), the United States again changed its policy in respect to the lands in controversy by providing for a commission of three persons to negotiate with all "Indians owning or claiming lands lying west of the 96th "degree of longitude in the Indian Territory for the cession "to the United States of all their title, claim or interest of "every kind or character in and to said lands."

This act is *pro tanto* a declaration of an abandonment of

the former purposes of the United States in respect to the lands in this controversy.

In 1891 the three commissioners of the United States provided for as above shown went upon the lands in this controversy to the Wichita and affiliated bands of Indians and made an agreement with them in June of that year as if the said Indians were the owners of said lands, and in said agreement (article ---) provided for the allotment of 160 acres to each of 1,060 of said Indians and the sale of the remainder for the benefit of said Indians, and this after the Choctaws and Chickasaws had made known to the United States by memorial to Congress their claim of ownership of said lands, and after said memorial had been referred to the Interior Department and the validity of their claim to said lands had been most favorably reported upon and recognized, and after Congress had passed the act of March 3, 1891, appropriating payment to the Choctaws and Chickasaws for the lands occupied under executive order by the Cheyenne and Arapahoe Indians, which last-named lands were also a part of the said "leased district" and occupied precisely the same legal status in respect to the Choctaws and Chickasaws as the lands in this controversy, and this said agreement of June, 1891, was entered into without notice to the Choctaws and Chickasaws and without their knowledge and consent. This action of the United States in passing said act of March 2, 1889, and in making said agreement of June, 1891, shows a complete abandonment of its purposes in respect to the lands in this controversy as those purposes appear in the ninth article of the treaty of 1855 and in the third article of the treaty of 1866, and absolves the Choctaws and Chickasaws from their obligations to comply in any respect with said articles of said treaties, in so far as the lands in this controversy are concerned.

Hence the Choctaws and Chickasaws call attention anew to that part of the nineteenth paragraph of their petition

wherein they claim compensation for the value of the lands which by said act of March 2, 1895, are to be allotted to the members of the said Wichita and affiliated bands of Indians.

Our contention in respect of the Wichitas and affiliated bands is that they went upon these lands not because they ever paid anything for them or had any aboriginal rights therein, but were moved there by the Government for the purpose of locating them in the Indian country, and to remove them from the States where their presence was objectionable, for the convenience of the Government and to carry out its policy of endeavoring to locate certain Indians in the Indian Territory. They were placed there by the Government as tribes or bands, and the Government only paid the Choctaws and Chickasaws for the privilege of locating these tribes or bands in that Indian country as tribes or bands. By the grant of this privilege to the Governmen the Wichitas and affiliated bands or tribes acquired no int terest in these lands, and consequently, when the purpose for which the Choctaws and Chickasaws granted this privilege was or shall be abandoned, the right of the Choctaws and Chickasaws is precisely the same as though no such permission had ever been granted. The abandonment of its policy by the Government and the adoption of an entirely different one gave the Wichitas no rights in these lands as against the Choctaws and Chickasaws, and if by reason of this change any injury comes to the Wichitas and affiliates, it is for the Government, out of its own funds, and not for the Choctaws and Chickasaws to make compensation. Hence we insist that the Court of Claims erred in decreeing to the individuals of the Wichitas and affiliates one hundred and sixty acres each out of these lands that belong to the Choctaws and Chickasaws.

J. M. Wilson,
Attorney of Choctaws and Chickasaws.